Supreme Court, U.S.
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No. 10-1058

In the
Supreme Court of the United States

YANKTON SIOUX TRIBE, AND ITS INDIVIDUAL MEMBERS,
Cross-Petitioners

v.

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, MARTY J. JACKLEY, ATTORNEY GENERAL OF SOUTH DAKOTA, SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT, PAM HEIN, STATE'S ATTORNEY OF CHARLES MIX COUNTY, ET AL.,
Cross-Respondents

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Yankton Sioux Reservation includes all lands within its original boundaries other than those the Tribe ceded to the United States for sale to non-Indians in the Act of 1894, ch. 290, 28 Stat. 286, 314-19.

PARTIES TO THE PROCEEDING

Cross-petitioners are the Yankton Sioux Tribe and its individual members.

Cross-respondents are Dennis Daugaard, Governor of South Dakota; Marty J. Jackley, Attorney General of South Dakota; Southern Missouri Recycling and Waste Management District; Pam Hein, State's Attorney of Charles Mix County; Keith Mushitz, Member of the Charles Mix County, South Dakota, County Commission; Neil Von Eschen, Member of the Charles Mix County, South Dakota, County Commission; and Jack Soulek, Member of the Charles Mix County, South Dakota, County Commission.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The amended opinion of the court of appeals is reported at 606 F.3d 994 and reproduced at Pet. App. 1-51.[1] The court of appeals' order on rehearing is reported at 606 F.3d 985 and reproduced at Pet. App. 52-70. The order of the district court is reported at 529 F. Supp. 2d 1040 and reprinted at Pet. App. 122-163.

An earlier opinion of the Eighth Circuit in this case is reported at 188 F.3d 1010 and reprinted at Pet. App. 199-249. The district court's earlier order is reported at 14 F. Supp. 2d 1135 and reprinted at Pet. App. 250-320.

JURISDICTION

The court of appeals entered judgment on May 6, 2010, and denied timely petitions for rehearing and rehearing en banc on September 20, 2010. Pet. App. 321-322. On December 14, 2010, Justice Alito extended the time for filing a petition for a writ of certiorari to January 18, 2011, and the petitions were filed on that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Treaty of April 19, 1858, 11 Stat. 743, is reprinted at Pet. App. 324-36.

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[1] "Pet. App." refers to the appendix to the petition for certiorari in No. 10-929.

The Act of August 15, 1894 ("1894 Act"), ch. 290, 28 Stat. 286, 314-319, ratifying the agreement between the Yankton Sioux Tribe and United States is reprinted at Pet. App. 337-351.

The statute defining "Indian country," 18 U.S.C. § 1151, provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

STATEMENT OF THE CASE

In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), this Court held that the Yankton Sioux Tribe's sale of approximately 168,000 acres of reservation land to the United States in 1894 had deprived those acres of reservation status and thereby diminished the reservation. On remand, the parties disputed whether the other 262,300 acres within the original reservation remained reservation land, or whether Congress had completely disestablished the reservation in 1894. The court of

appeals did not fully agree with either party. The court held that Congress did not disestablish the reservation. But it also held that Congress intended in 1894 that subsequent sales of land to non-Indians would further diminish the reservation, and that such sales had caused the reservation to shrink to a fraction of its 1894 size.

When the Eighth Circuit first reached that conclusion years ago, both sides petitioned for review, and this Court denied the petitions. In the ensuing 12 years, the litigation has continued, and the Eighth Circuit has now applied its earlier decision to determine the status of particular parcels. The Tribe has not filed its own petition from that decision because, during the past 12 years, all parties have adjusted to the practical realities on the ground. That makes this Court's review of the Eighth Circuit's fact-bound decision unnecessary, as the Eighth Circuit simply applied its earlier decision in this case and well-established precedents of this Court to specific parcels.

Nonetheless, state and local entities have filed petitions for a writ of certiorari so that they can continue to argue that Congress completely disestablished the reservation in 1894. This Court should deny those petitions. But if it were to grant them, it should also grant this conditional cross-petition so that the Court would not find itself procedurally hamstrung from adopting any of the parties' positions concerning congressional intent and from giving congressional intent its full effect.

Disestablishment or diminishment of a reservation turns on a judgment about congressional

intent — here, the intent of the Congress that enacted the 1894 Act. After this Court's decision in *Yankton*, there are, at least in theory, three possibilities: Congress intended to diminish the reservation only to the extent of the lands it purchased for sale to non-Indians in 1894, as the Tribe has argued; Congress intended further diminishment, as the court of appeals concluded; or Congress intended to completely disestablish the reservation, as petitioners argue. If this Court takes up the question, it should be free to draw whichever of those conclusions it wishes after fully considering the question on the merits. Granting this conditional cross-petition would ensure that the Court would not be procedurally barred from doing so.

As explained below, the same textual and contextual evidence of congressional intent that bears on petitioners' complete disestablishment theory is also relevant to the Tribe's conditional cross-petition. That evidence shows that Congress intended to address only the 168,000 acres of ceded land, and had no intent, much less the requisite clear intent, to affect the reservation status of the remaining lands. Thus, the same evidence that rebuts petitioners' complete disestablishment theory also supports the Tribe's understanding that Congress has not further diminished the reservation. Especially against that backdrop, it would make little sense to determine whether Congress decided to retain a diminished reservation without fully considering the closely interrelated question of what diminished reservation Congress had in mind.

A. Historical Background

1. An 1858 Treaty between the Yankton Sioux Tribe and the United States established the original boundaries of the Yankton Sioux Reservation. Pet. App. 324. The Tribe ceded to the United States more than 11 million acres of its aboriginal lands, and retained 430,405 acres in what is today Charles Mix County, South Dakota, as its reservation. *See id.* at 325.

2. Three decades later, Congress changed policies in the Dawes Act or General Allotment Act of 1887, ch. 119, 24 Stat. 388, *repealed in part*, Pub. L. 106-462, § 106, 114 Stat. 1991, 2007 (2000). The Dawes Act reflected a federal policy of opening up lands for settlement, and breaking up reservations into smaller pieces, through the "allotment" of reservation parcels to individual Tribe members. The United States was to hold each allotted parcel in trust "for the sole use and benefit of the Indian [allottee]" for 25 years; after that time, the Tribe member would assume fee simple ownership of the parcel and could freely alienate it. 24 Stat. at 389. The Dawes Act further authorized the Executive Branch to "negotiate" with the Tribe to purchase, "in conformity with the treaty or statutes under which such reservation is held," the *unallotted* portions of the reservation on "just and equitable" terms. *Id.*

The United States allotted over three-fifths of the 1858 Yankton Sioux Reservation under the Dawes Act in a patchwork of scattered, noncontiguous parcels. That left approximately two-fifths of the reservation lands — 168,000 acres — unallotted. In 1894, the United States reached an

agreement with the Tribe, which Congress ratified in the Act of August 15, 1894 ("1894 Act"), ch. 290, 28 Stat. 286, 319, to purchase those unallotted acres for $600,000. *See* Pet. App. 337-351. The Tribe thereby agreed to surrender approximately 168,000 unallotted acres from its 430,405-acre reservation, leaving approximately 262,300 acres of allotted lands. Article VIII of the agreement required the United States to set aside from sale to non-Indians 1,000 acres of the ceded land for "agency, schools, and other purposes" for the support of the Tribe. *Id.* at 342-343.

3. By the early twentieth century, the issuance of fee patents, often well before the 25-year trust period had duly expired, "left many Indians landless." *Id.* at 11. The federal government also acknowledged that its policy of encouraging assimilation had failed in light of the Indians' "'cultural resilience.'" *Id.* The government therefore extended, re-extended, and then permanently extended the 25-year trust periods on parcels of the Yankton Sioux Reservation that it held in trust. *See id.* at 10 (citing Exec. Order No. 2363, Apr. 20, 1916; Exec. Order No. 4406, Mar. 30, 1926; Exec. Order No. 5173, Aug. 9, 1929); 25 U.S.C. § 462. In 1929, rather than opening the 1,000 acres of reserved agency trust lands to non-Indian settlers, Congress returned the lands to the Tribe and specifically prohibited their allotment. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167.

The Indian Reorganization Act of 1934 ("IRA"), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 *et seq.*), extended those policies. In addition to putting an end to further allotment and

extending the trust periods for outstanding allotments indefinitely, the IRA authorized the Secretary of the Interior to acquire additional lands in trust to create or add to tribal reservations. Under the IRA, the federal government has taken nearly 6,500 acres into trust for the benefit of the Yankton Sioux Tribe. Pet. App. 12.

B. Procedural Background

1. This cross-petition involves the proceedings on remand from this Court's decision in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998). In *Yankton*, this Court held that the Tribe's cession of 168,000 acres of unallotted lands to the United States had diminished the original 1858 reservation. *See id.* at 345. The Court then concluded that, because a proposed waste site lay on ceded land, it was not within the diminished reservation and therefore not subject to federal environmental regulation. *Id.* at 340, 358.

This Court did not reach the broader question whether the 1894 Act had "disestablished" the Yankton Sioux Reservation in its entirety. *Id.* at 358. The Court noted, however, that some clauses of the 1894 Act "contradict[ed]" and "counsel[ed] against finding the reservation terminated." *Id.* at 350. Specifically, the Court pointed to Article VIII, which required the United States to reserve lands "for agency, schools, and other purposes," and observed that it was "'difficult to imagine'" why Congress would have reserved such agency trust lands "'if it did not anticipate that the opened area would remain part of the reservation.'" *Id.* (quoting *Solem v. Bartlett*, 465 U.S. 463, 474 (1984)). The

Court further noted that Article XVII, which prohibited the sale of liquor on ceded lands or other lands within the reservation, "signal[ed] a jurisdictional distinction between reservation and ceded land." *Id.*

2. On remand, and after the case was consolidated with another one concerning the reservation's boundaries, the district court conducted an evidentiary hearing and held that the 1894 Act diminished the reservation only insofar as the Tribe had ceded the unallotted lands for sale to non-Indians in 1894. *See* Pet. App. 250-320. The court reasoned that nothing in the language of the agreement supported complete disestablishment of the reservation, whereas several articles strongly indicated that a diminished reservation would persist. *See id.* at 287-304.

The district court also relied on the context of the Act. Reports of the government's negotiations with the Tribe, the court observed, "memorialized only the consent of the Tribe to sell the surplus [unallotted] lands"; they did not discuss complete disestablishment or further diminishment beyond the unallotted lands. *Id.* at 276. Representations by the Commissioners who negotiated the agreement further suggested that the Tribe would retain independent powers of self-government over the lands it did not cede. *See id.* at 276-281. Based on the evidence, the court concluded that the Yankton Sioux Reservation consists, in diminished form, of all land "within the original exterior 1858 Treaty boundaries" that the Tribe did not cede to the United States in the 1894 Act, as well as the agency trust

land that the Act specifically reserved from sale. *Id.* at 316.

The Eighth Circuit affirmed in part, reversed in part, and remanded for further proceedings. *See id.* at 199-249. The court of appeals agreed that the 1894 Act did not disestablish the Yankton Sioux Reservation. *Id.* at 240-243. At a bare minimum, the Eighth Circuit noted, the agency trust lands — which the United States returned to the Tribe in 1929 — remain part of the reservation. *Id.* at 241. The court of appeals disagreed, however, with the Tribe's argument that the original reservation had been diminished only with respect to the ceded lands; rather, the court found the reservation further diminished by subsequent sales of allotted lands to non-Indians — lands that, according to the court, Congress in 1894 "foresaw would pass into the hands of the white settlers and homesteaders." *Id.* at 243.

Both the State and the Tribe sought certiorari, with the State maintaining its total disestablishment position and the Tribe maintaining the position on which it had prevailed in the district court — namely, that the reservation had not been further diminished by sales of allotted lands to non-Indians. The United States opposed certiorari, noting the absence of a clear split and the interlocutory posture of the case. Nonetheless, the United States stated that it "agree[d] with the Tribe" that the reservation has not been further diminished. U.S. Br. in Opp. (Nos. 99-1490, 99-1683) at 21. The United States also noted that, if the Court were to grant certiorari, it should "grant both petitions, in order to ensure that it has before it the full range of issues going to both diminishment and

disestablishment of the Reservation." *Id.* at 27 n.10. This Court denied review. *See South Dakota v. Yankton Sioux Tribe*, 530 U.S. 1261 (2000).

3. On remand, the district court held that various trust lands within the original 1858 boundaries maintained reservation status: (1) agency trust lands reserved to the United States in the 1894 Act, then returned to the Tribe in 1929; (2) lands allotted to individual Indians that remain in trust today; (3) lands additionally taken into trust under the 1934 IRA; and (4) lands allotted to individual Indians that are still owned in fee by Tribe members but not held in trust. *See* Pet. App. 122-163.

On appeal, the Eighth Circuit largely affirmed. *See id.* at 1-51. The court of appeals held that the diminished reservation included (1) agency trust lands, (2) allotted lands that remain in trust, and (3) lands taken into trust under the 1934 IRA. *Id.* at 51. The court found further that nearly 175 acres of miscellaneous lands acquired in trust under authorities other than the IRA qualify as dependent Indian communities under the definition of "Indian country" in 18 U.S.C. § 1151(b). *Id.* at 42-43. But the court of appeals vacated the district court's holding that allotted fee lands continuously owned by Indians but not held in trust are also Indian country, reasoning that the lack of a "fully developed record" on such lands meant the issue was not ripe for review. *Id.* at 46.

4. The State defendants, County defendants, and Southern Missouri Recycling and Waste Management District filed petitions for certiorari

seeking review of one issue: whether the 1894 Act wholly disestablished the Yankton Sioux Reservation.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

In the 12 years since the Eighth Circuit's earlier decision on which this Court denied certiorari, the practical reality on the ground has adjusted to reflect the Eighth Circuit's basic ruling. For that reason, and others, the Tribe has decided not to file its own petition for certiorari as it did 11 years ago. The Tribe's brief in opposition outlines the reasons this Court should decline to review the Eighth Circuit's fact-bound decision. If this Court were to grant the pending petitions, however, it should also grant this conditional cross-petition so that it could fully assess and apply Congress's intent.

When Congress enacted the 1894 Act, it could, at least in theory, have intended one of four consequences: (1) to leave the 1858 reservation intact; (2) to diminish the reservation only to the extent of the unallotted lands it purchased from the Tribe for sale to non-Indian settlers; (3) to diminish the reservation further; or (4) to disestablish the reservation entirely. This Court already rejected the first of those alternatives, and the third and fourth would be options for the Court if it granted the petitions. This conditional cross-petition puts the other remaining option squarely before the Court, so that it would not be procedurally barred from reaching any of the possible conclusions about congressional intent or the current bounds of the reservation.

1. The petitions and this conditional cross-petition all rely on overlapping evidence of congressional intent. "The first and governing principle is that *only Congress* can divest a reservation of its land and diminish its boundaries," and "[o]nce a block of land is set aside for an Indian reservation ... the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470 (emphasis added). Moreover, Congress's intent to diminish a reservation must be "clear and plain," *United States v. Dion*, 476 U.S. 734, 738 (1986), meaning that it must be "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973). Accordingly, the "'most probative evidence'" of either disestablishment or diminishment is "'the statutory language used to open the Indian lands,'" as well as "'the historical context.'" *Yankton*, 522 U.S. at 344 (quoting *Hagen v. Utah*, 510 U.S. 399, 411 (1994)).

Petitioners have attempted to support their total disestablishment theory with the 1894 Act, reports of the Yankton Indian Commission that negotiated the agreement, and the legislative history and negotiations surrounding the agreement. *See, e.g.*, Pet. App. 229-230. The Tribe has relied on those same sources in arguing for the conclusion that Congress intended to preserve the reservation except with respect to the lands the Tribe ceded for sale to non-Indians.

The district court — in agreement with the Tribe — found "strong textual and contemporaneous evidence ... establishing that the Yanktons' allotted lands retained reservation status." *Id.* at 307. For

example, Article V of the 1892 agreement provides for the continued funding of tribal courts of justice and other local institutions, consistent with the continuing reservation status of allotted lands. *Id.* at 340-341. Because that provision reflects an expectation that the Tribe would maintain a sovereign existence, it "counsel[s] against finding the reservation terminated." *Yankton*, 522 U.S. at 350. Similarly, Article VIII reserves from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes." Pet. App. 342-343. As this Court already determined, it is "difficult to imagine" why Congress would have reserved lands for that purpose "if it did not anticipate that the opened area would remain part of the reservation." *Yankton*, 522 U.S. at 350 (quoting *Solem*, 465 U.S. at 474).

This Court further noted in *Yankton* that certain Articles of the Act "signal[ed] a jurisdictional distinction between reservation and ceded land." *Id.* at 350. The liquor prohibition in Article XVII prohibits the sale or offering of "intoxicating liquors" on "any of the lands by this agreement ceded and sold to the United States" or "any other lands *within or comprising the reservations of the Yankton Sioux* or Dakota Indians as described in the [1858] treaty." Pet. App. 347 (emphasis added).

The context of the Agreement further supports the conclusion that Congress did not intend to affect the reservation status of non-ceded lands. In the negotiations leading up to the 1894 Act, the parties "did not discuss the future boundaries of the reservation or the relinquishment of the entire reservation by the Tribe, but memorialized *only the*

consent of the Tribe to sell the surplus lands remaining after the allotment process was completed." *Id.* at 276 (emphasis added). As Commissioner Cole represented to the Tribe at the first council meeting: "The Great White Father ... wants to give you a chance to sell your surplus lands .... *He does not want you to sell your homes that he has allotted to you.* He wants you to keep your homes forever. *He only wants you to sell your surplus lands* for which you have no use." Report of the Yankton Indian Commission (Mar. 31, 1893), S. Exec. Doc. No. 27, at 49 (emphases added). Similarly, Commissioner Adams noted, "We understand that you each received an allotment of land on which to make a home.... We also understand that you own, outside of your allotments, a large quantity of land in common. It is this land that you own in common that we were appointed by the Great Father to talk to you about." *Id.* at 48; *see also id.* at 81 (Commissioner Cole asked the Tribe to accept "the sale of the surplus lands and the *opening of this reservation to white settlement*," not disestablishment of the reservation) (emphasis added).

Each of those statements reflects a targeted intent to negotiate only the sale of the unallotted lands, without affecting the other reservation lands. Indeed, "[a]t no point in the Commissioners' reports is there any mention by a commissioner or by a Yankton Sioux, of any anticipated change in the reservation boundaries or of a disestablishment or termination of the Yankton Sioux Reservation." Pet. App. 284.

When the Commissioners submitted the agreement to Congress, they again confirmed that the Yankton Sioux Indians "were not selling their whole reservation, but less than two-fifths of it." *Id.* at 236 (quoting S. Exec. Doc. No. 27, at 13). The preamble to the 1894 Act similarly recites that the Tribe "is willing to dispose of *a portion* of the land set apart and reserved to said tribe" in 1858. *Id.* at 338 (emphasis added). As the district court noted, that provision reflects congressional intent to accept the will of the Tribe to sell only a portion of its reservation, not to disestablish or diminish the remainder. *Id.* at 148-150.

That interpretive evidence not only refutes petitioners' total disestablishment position, it also supports the Tribe's view that Congress did not diminish the reservation beyond the cession of unallotted lands for sale to non-Indians. At this juncture, of course, the question of who has the better of the argument based on those sources is beside the point. The critical point is that the same basic sources are relevant to the issues raised in the petitions and this conditional cross-petition. If the Court were to grant the petitions, there would be no reason to truncate either the inquiry into legislative intent or the relief available — *i.e.*, there would be no reason to grant the petitions and not this conditional cross-petition.

2. The lower courts recognized the relationship between petitioners' arguments concerning disestablishment and the Tribe's argument. *See, e.g., id.* at 33-34; *id.* at 226-227. The United States, for example, has argued that the conclusion that the "Reservation continues to encompass all lands that

were not ceded ... was supported by the fact that nothing in the explicit language of the 1894 [Act] supports disestablishment." U.S. CA8 *Gaffey* Br. at i.

In this Court, petitioners argue that the court of appeals' decision is "internally contradictory" to the extent that it concludes that the reservation was not disestablished but does not include *all* allotted acres, because, petitioners argue, private sales of allotted lands cannot deprive those lands of reservation status. State Pet. 31; *see also* County Pet. 21-22; S. Mo. Recycling & Waste Mgmt. Dist. Pet. 9-10. That is not necessarily true, as the Tribe explains in its brief in opposition. But petitioners' all-or-nothing approach confirms the close relationship between the questions presented in the petitions and this conditional cross-petition. Petitioners certainly ought not be able to argue both that the court of appeals' middle-ground position is untenable and that this Court should not consider the other alternative position.

3. For these reasons, if this Court were to grant the petitions, it should also grant this conditional cross-petition to ensure that its consideration of the full range of issues and remedies is unfettered and to eliminate any risk that it would face a procedural bar to deciding the case in accordance with its own view of Congress's intent in the 1894 Act. There is no reason for this Court to limit its options to such an extent that, following full briefing and consideration on the merits, the Court would have no choice but to consider only the State's disestablishment position, and the result reached by

the court of appeals, but not the other remaining view of Congress's intent.

CONCLUSION

This Court should deny the petitions for a writ of certiorari in Nos. 10-929, 10-931, and 10-932. But if this Court were to grant those petitions, it should also grant this cross-petition.

Respectfully submitted,

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Nos. 10-929, 10-931, 10-932 and 10-1058

In the Supreme Court of the United States

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ON PETITIONS AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, did not wholly disestablish the Yankton Sioux Reservation.

2. Whether the Yankton Sioux Reservation includes all lands within its original boundaries other than those the Tribe ceded to the United States for sale to non-Indians in the 1894 Act.

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In the Supreme Court of the United States

No. 10-929

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, ET AL., PETITIONERS

v.

YANKTON SIOUX TRIBE, ET AL.

No. 10-931

SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT, PETITIONER

v.

YANKTON SIOUX TRIBE, ET AL.

No. 10-932

PAM HEIN, STATE'S ATTORNEY OF CHARLES MIX COUNTY, ET AL., PETITIONERS

v.

YANKTON SIOUX TRIBE, ET AL.

No. 10-1058

YANKTON SIOUX TRIBE, ET AL., PETITIONERS

v.

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, ET AL.

ON PETITIONS AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-51a)[1] is reported at 606 F.3d 994. The memorandum opinion and order of the district court (Pet. App. 122-163) is reported at 529 F. Supp. 2d 1040. A prior opinion of the court of appeals (Pet. App. 199-249) is reported at 188 F.3d 1010. A prior memorandum opinion and order of the district court (Pet. App. 250-320) is reported at 14 F. Supp. 2d 1135.

JURISDICTION

The original judgment of the court of appeals was entered on August 25, 2009. The court of appeals denied rehearing en banc and issued an amended opinion on May 6, 2010. Subsequent petitions for rehearing were denied on September 20, 2010 (Pet. App. 321-322). On December 14, 2010, Justice Alito extended the time within which to file petitions for writs of certiorari to and including January 18, 2011 (Pet. App. 323), and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The conditional cross-petition was filed on February 22, 2011.

STATEMENT

1. Section 1151 of Title 18 classifies three categories of land as "Indian country": "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"; "(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired

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[1] Citations in this brief to the petition appendix refer to the petition appendix in No. 10-929.

territory thereof, and whether within or without the limits of a state"; and "(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." For land in any of these three categories, criminal jurisdiction in cases involving tribal members generally rests primarily with the United States and the particular Indian tribe, rather than the State in which the Indian country lies. See 18 U.S.C. 1151-1153. The same distinction "generally applies * * * to questions of civil jurisdiction" as well. *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975); see *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998).

2. The Treaty of April 19, 1858, 11 Stat. 743 (Pet. App. 324-336), established a 430,000-acre Reservation for the Yankton Sioux Tribe (Tribe) in what is now Charles Mix County in southeastern South Dakota. Pet. App. 5-6. Roughly 30 years later, Congress authorized the Executive Branch to divide portions of Indian reservations into allotments: individual parcels of land that would be held in trust by the United States for the benefit of individual tribal members to whom the parcels could eventually be conveyed in fee. See Indian General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (1887); Act of Feb. 28, 1891, ch. 383, 26 Stat. 794. More than 262,000 non-contiguous acres of the Yankton Sioux Reservation were allotted. Pet. App. 8.

In 1892, Congress directed the Secretary of the Interior to negotiate with the Tribe for the sale of surplus reservation lands that were not needed for allotments. Act of July 13, 1892, ch. 164, 27 Stat. 137. In December 1892, tribal leaders signed an agreement (the 1892 Agreement), later adopted by a majority of the Tribe, in which the Tribe agreed to "cede, sell, relinquish, and

convey" its interest in all the unalloted lands—approximately 168,000 acres interspersed among the allotments—within the Reservation for $600,000. Pet. App. 8, 339. Although the Agreement specified that most of the ceded land would be sold to non-Indian settlers, a portion was exempted from such sale and set aside for continued use by the United States for Indian agency, schools, and other tribal-support purposes for as long as necessary. *Id.* at 342-343. In 1894, Congress "accepted, ratified, and confirmed" the 1892 Agreement. Act of Aug. 15, 1894, ch. 290, § 12, 28 Stat. 319 (1894 Act).

3. In *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998), this Court held that the 1894 Act diminished the Reservation by severing the unallotted ceded lands from the Reservation. In reaching that result, the Court principally relied upon the "'cession' and 'sum certain'" language in the 1894 Act, by which the Tribe ceded and conveyed all of its interest in the unallotted lands for a sum certain. *Id.* at 344. The Court had previously held that such language creates an "almost insurmountable" presumption of diminishment. *Ibid.*; *Hagen* v. *Utah*, 510 U.S. 399, 411 (1994); *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984).

The land at issue in *Yankton Sioux Tribe* was unallotted land ceded to the United States by the 1894 Act for sale to settlers. The Court therefore found it unnecessary to decide whether the Reservation had been wholly disestablished. 522 U.S. at 358.

4. On remand, the district court consolidated the original action, *Yankton Sioux Tribe* v. *Southern Missouri Waste Management District* (No. 94-4217), with a new action, *Yankton Sioux Tribe* v. *Gaffey* (No. 98-4042). In the new action, the Tribe sought declaratory and injunctive relief precluding the State of South

Dakota and Charles Mix County from exercising criminal jurisdiction over tribal members on (1) any lands that had been allotted to members of the Tribe, whether or not those lands are now held in trust by the United States for the Tribe or individual members, and (2) the lands that had been reserved from sale to non-Indians under the 1894 Act for Indian agency, school, and other purposes, which are at present held in trust by the United States for the Tribe. The United States, which had previously participated in the original action as an amicus curiae, intervened in the consolidated action. Pet. App. 202-203.

The district court, after taking additional evidence, held that Congress had not disestablished the Yankton Sioux Reservation. Pet. App. 253. The court concluded that the 1894 Act had "modified or reconceptualized" the Reservation to consist of all of the lands within the original 1858 exterior boundaries that had not been ceded to the United States for sale to non-Indian settlers; accordingly, the Reservation continued to consist of "all of the reservation lands that were allotted pursuant to the allotment acts, as well as the lands reserved from sale for agency, school, and other tribal purposes." *Ibid.* The court based that conclusion on the text of the 1894 Act and the 1892 Agreement, the record of negotiations between the United States Commissioners and the Tribe, the materials submitted to Congress in connection with passage of the 1894 Act, and the subsequent treatment of the allotted lands by the United States, the State, and the Tribe. *Id.* at 250-321.

5. The court of appeals affirmed in part and reversed in part. Pet. App. 199-249. It agreed with the district court that the Reservation had not been disestablished. *Id.* at 203. But the court held that the Reservation had

been further diminished to exclude not only the unalloted ceded lands that were the subject of this Court's decision in *Yankton Sioux Tribe*, but also additional lands that had passed into non-Indian hands. *Id.* at 247.

a. At the outset, the court of appeals recited the well-settled principles governing the analysis of reservation diminishment and disestablishment questions. First, the court noted that "[c]ongressional intent is the touchstone" for determining whether a reservation has been diminished or disestablished, and thus that land set aside for a reservation retains that status until Congress indicates otherwise. Pet. App. 224 (citing *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977), and *Solem*, 465 U.S. at 470). Second, the court noted that Congress's "[i]ntent to diminish or disestablish a reservation must be 'clear and plain,'" and "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Id.* at 225 (quoting *United States* v. *Dion*, 476 U.S. 734, 738 (1986), and *Mattz* v. *Arnett*, 412 U.S. 481, 505 (1973)). Third, the court noted that "neither diminishment nor disestablishment will be found lightly," and that any ambiguities in statutes or agreements bearing on the question are resolved in favor of the Tribe. *Id.* at 229 (citing *Yankton Sioux Tribe*, 522 U.S. at 344; *Hagen*, 510 U.S. at 411). Finally, the court noted that each statute that is claimed to have disestablished or diminished a reservation "must be analyzed individually, its effect depending on the language used and the circumstances of its passage." *Id.* at 228 (citing *Solem*, 465 U.S. at 469).

b. The court of appeals held that no sufficiently clear expression of Congress's intent to disestablish the Yankton Sioux Reservation could be found in the text of

the 1894 Act and the incorporated 1892 Agreement, in the record of the negotiations between the United States and the Yankton Sioux, or in the other materials before Congress at the time of the adoption of the 1894 Act. Pet. App. 229-243.

The court of appeals observed that Articles I and II of the 1894 Act—the provisions principally relied on by this Court in *Yankton Sioux Tribe*—"refer[] explicitly only to the ceded lands." Pet. App. 229. The court determined that three other articles of the 1894 Act contemplated some degree of continuing tribal governance over the allotted lands. The court concluded that Article V, which provided for an optional fund that could be used, among other things, for schools, courts, and "other local institutions for the benefit of said tribe," "clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux." *Id.* at 238-239; see *id.* at 340-341. The court viewed Article XVII, which prohibited the sale of liquor "upon any of the lands by this agreement ceded and sold to the United States" and "upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians," as "acknowledg[ing] the continued existence of two distinct categories of land to which different laws might apply." *Id.* at 239-240; see *id.* at 239 (Article XVII "signal[ed] a jurisdictional distinction between reservation and ceded land") (quoting *Yankton Sioux Tribe*, 522 U.S. at 350) (brackets in original). And the court read Article VIII, which reserved from sale to settlers those ceded lands "as may now be occupied by the United States for agency, schools, and other purposes," as indicating that "some lands were expected to remain outside of primary state jurisdiction." *Id.* at 240.

The court of appeals likewise found no clear indication of an intent to disestablish the Reservation in the record of the negotiations between the United States and the Tribe. Pet. App. 231-237. The court observed that the United States Commissioners who negotiated the 1892 Agreement had "repeatedly emphasized" to the Tribe that "their primary objective was the purchase of the *unallotted* lands." *Id.* at 232. The court noted that the Commissioners had also "indicated that the tribal leadership would retain some governing powers," and it viewed such indications as "suggest[ing] the parties did not intend to disestablish the reservation." *Id.* at 233. The court further observed that the Commissioners' subsequent report to Congress did not equate the Tribe's sale of the surplus lands with the Tribe's immediate loss of sovereignty over the unceded lands. *Id.* at 235-237. The report instead reflected what the court described as the parties' understanding that "only a portion of the reservation was being separated at that time." *Id.* at 236.

The court of appeals additionally concluded that "treatment of the Yankton area in the years following passage of the [1894] Act provides further evidence that the nonceded lands retained their reservation status until they passed out of trust." Pet. App. 243-244. Among other things, the court of appeals discussed evidence in the record regarding the Tribe's maintenance of a tribal police force and an independent judicial system, and Congress's "definitive and considered step" when, in 1929, it decided to return the lands previously reserved for tribal-support purposes to the Tribe and prohibited the allotment of those lands. *Id.* at 244-246 & n.12.

c. The court of appeals concluded, however, that the 1894 Act intended to diminish the Reservation not only by removing the ceded land, but also other (allotted) land that subsequently passed into the hands of non-Indians. Pet. App. 243, 247. The court stated that the 1894 Act, when "read in its full historical context," contemplated that tribal members would eventually obtain fee title to their allotted lands and gain the ability to sell those lands to non-Indians, and the lands would thus become subject to the civil and criminal laws of the State. *Id.* at 243. The court of appeals did not determine precisely which lands—other than roughly 1000 acres originally reserved in the 1894 Act for tribal-support purposes, which Congress, in 1929, specified should be returned to the Tribe, see Act of Feb. 13, 1929, ch. 183, 45 Stat. 1167 (1929 Act)—remained within the surviving Reservation, instead remanding to the district court to make that determination in the first instance. Pet. App. 248-249.

6. The State, the County, and the waste management district (collectively, "petitioners"), and also the Tribe, filed petitions for writs of certiorari. They presented the same issues for review that they present here: petitioners contended, contrary to the court of appeals, that the Reservation had been disestablished; the Tribe contended, contrary to the court of appeals, that the present-day Reservation includes allotted lands that have passed out of Indian ownership. See 99-1490 Pet. 11-29; 99-1683 Pet. 4-22. The United States urged the Court to deny both petitions, U.S. Br. in Opp., Nos. 99-1490 and 99-1683, and the Court denied certiorari. See *South Dakota* v. *Yankton Sioux Tribe*, 530 U.S. 1261 (2000); *Yankton Sioux Tribe* v. *Gaffey*, 530 U.S. 1261 (2000).

7. On remand, the district court held that the following lands remained within the Reservation, and were therefore Indian country under 18 U.S.C. 1151(a): (1) land allotted to members of the Tribe in 1894 and held continuously in trust by the United States for the benefit of the Tribe or its members since that time (30,051.66 acres); (2) land taken into trust by the United States for the benefit of the Tribe under the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (1934) (6444.47 acres); (3) land reserved to the United States in 1894 and returned to the Tribe pursuant to the 1929 Act (913.83 acres); and (4) Indian-owned fee land that has been continuously in Indian hands since 1894. Pet. App. 162; see *id.* at 82.

The district court held in the alternative that, for two independent reasons, lands in categories 1 and 2 above would be Indian country for jurisdictional purposes even if they were *not* part of a formally designated reservation. First, the court determined that those lands, if not part of a formal reservation, constituted an "informal" or "de facto" reservation, and thus would still be Indian country under Section 1151(a). Pet. App. 153-157. The court observed that under this Court's decisions, "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation,'" but instead on "whether the area has been validly set apart for the use of the Indians as such, under the superintendence of the Government." *Id.* at 153 (quoting *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (some quotation marks omitted). The court concluded, based on the evidence of federal superintendence, that the lands met this definition. *Id.* at 156.

Second, the court determined that these lands also constituted a "dependent Indian community" under Section 1151(b). *Id.* at 159-160. "The Supreme Court," it explained, "established two requirements for off-reservation land to qualify as a dependent Indian community under § 1151(b): 'a federal set-aside and a federal superintendence requirement.'" *Id.* at 160 (quoting *Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 530) (emphasis omitted). The court held, based on the evidence, that the lands satisfied these requirements. *Ibid.*

8. a. The court of appeals affirmed in part and vacated in part. Pet. App. 71-121. It reaffirmed its previous determination that the land reserved for tribal-support purposes in 1894 and returned to the Tribe under the 1929 Act was reservation land. *Id.* at 90-94. It also affirmed the district court's conclusion that two other categories of trust land—allotted land held continuously in trust by the United States and land taken into trust under the IRA—were part of the reservation as well. *Id.* at 97-112.[2] The court of appeals expressly recognized that these latter two categories of land would be considered Indian country even if the reservation had been disestablished. It observed that all parties conceded that the allotted trust lands would be Indian country under Section 1151(c), which specifically addresses allotments. *Id.* at 97-98. And it further observed that the IRA trust land would be Indian country pursuant to 25 U.S.C. 465. Pet. App. 105-107; see *id.* at 106 ("[S]ec-

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[2] The court of appeals noted that the district court had identified, but had not expressly addressed the status of, an additional 174.57 acres of trust land that had been taken into trust under statutes other than the IRA. Pet. App. 82-83, 112. The court of appeals concluded that these lands were "dependent Indian communities" and thus Indian country under Section 1151(b). *Id.* at 112-114.

tion 465 provides the proper avenue for a tribe to reestablish sovereign authority over territory.") (quoting *City of Sherill* v. *Oneida Indian Nation*, 544 U.S. 197, 221 (2005)) (brackets omitted)).

The court of appeals vacated, however, the district court's conclusion that continuously-Indian-owned fee lands are part of the Reservation. Pet. App. 114-116. It deemed the issue unripe because the record was undeveloped; among other things, it was not clear that any such lands existed. *Id.* at 115-116.

b. The panel granted in part petitioners' request for panel rehearing. Pet. App. 52-70. Petitioners' request "focus[ed] on dicta in a single footnote of [the court's] 37 page decision." *Id.* at 54. Petitioners argued that the footnote indicated that a certain set of lands—lands allotted to Indians in 1894 but sold to non-Indians after the enactment of Section 1151 in 1948—were part of the Reservation, and they (along with amici) claimed that various detrimental consequences flowed from that result. *Id.* at 58-59. The court explained that petitioners had "raised a straw man to attack" and were "well aware that the wording to which they object is not part of the judgment in this case." *Id.* at 59-60. The court nevertheless amended and reissued the opinion, removing language that might be "misunderstood" as reaching the issue of allotted lands transferred to non-Indians after 1948, but otherwise leaving the decision unaltered. *Id.* at 56; see *id.* at 1-51 (amended opinion).

ARGUMENT

The court of appeals correctly concluded that the Yankton Sioux Reservation has not been wholly disestablished and that the Reservation includes approximately 37,410 acres held in trust by the United States.

That fact-bound decision does not conflict with any decision of this Court or any other court of appeals. Nor does it have any significant practical consequence, given the jurisdictional treatment of the specific trust lands at issue in this case. For reasons largely explained by the lower courts, the trust lands are Indian country, and therefore presently subject primarily to federal and tribal jurisdiction rather than state jurisdiction, whether or not the Yankton Sioux Reservation was disestablished by the 1894 Act. Further review of the question presented by petitioners (regarding whether the Reservation was disestablished), as well as the question presented in the conditional cross-petition (regarding the extent of the Reservation), is accordingly unwarranted.

1. In concluding that the Reservation was not wholly disestablished in 1894, the court of appeals applied the standards repeatedly articulated by this Court, see, *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343-344 (1998), to the particular facts and circumstances of this case. Such a fact-specific application of settled legal standards does not merit this Court's review. See Sup. Ct. R. 10.

As the court of appeals recognized (Pet. App. 225), Congress's intent to diminish or disestablish a reservation must be "clear and plain," under a standard that considers the text of the relevant surplus land Act, the legislative history, and the surrounding circumstances. *Yankton Sioux Tribe*, 522 U.S. at 343-344 (quoting *United States* v. *Dion*, 476 U.S. 734, 738-739 (1986)); *Hagen* v. *Utah*, 510 U.S. 399, 411-412 (1994); *Solem* v. *Bartlett*, 465 U.S. 469, 470-471 (1984). "This Court does not lightly conclude that an Indian reservation has been terminated," and it resolves ambiguities in favor of the

tribe. *DeCoteau* v. *District County Court*, 420 U.S. 425, 444 (1975).

There was no expression of congressional intent, much less the "clear and plain" expression required by this Court, to disestablish the Yankton Sioux Reservation. The primary purpose of the 1894 Act was to transfer unallotted surplus lands from the Yankton Sioux Tribe to the United States. That transfer was accomplished by Articles I and II of the 1894 Act—the provisions that this Court principally relied upon in *Yankton Sioux Tribe*—which provided for the cession and conveyance of the surplus lands and established the amount of payment for those lands. See 522 U.S. at 344-345. Those articles refer only to the unallotted surplus lands, not to the lands that were to be allotted to tribal members. Pet. App. 339.[3]

No other provision of the 1894 Act offers any clear indication that Congress intended that the cession of the unallotted (or "surplus") lands would result in the disestablishment of the entire Reservation. Indeed, several

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[3] The County errs in asserting (County Pet. 24-25) that the "cession and sum certain" language contained in these articles gives rise to a "disestablishment presumption." As the decisions in both *Yankton Sioux Tribe* and *Solem* explain, such language creates only a "presumption of *diminishment*" (*i.e.*, that the reservation was reduced by the area sold), not a presumption of *disestablishment* (*i.e.*, that the reservation was eliminated entirely). *Yankton Sioux Tribe*, 522 U.S. at 344 (emphasis added); see *Solem*, 465 U.S. at 470-471. This Court has already applied the diminishment presumption in *Yankton Sioux Tribe* to find that the Reservation was diminished to the extent lands were ceded to the United States for sale to non-Indians. See 522 U.S. at 351. The question now is one of complete disestablishment, and, as explained in the text, the presumption favors the continuation of the reservation, unless congressional intent to the contrary is clearly shown.

provisions of the 1894 Act and the incorporated 1892 Agreement point to the opposite conclusion.

Article VIII of the 1894 Act reserved from sale to non-Indian settlers those lands ceded by the Tribe to the United States "as may now be occupied by the United States for agency, schools, and other purposes." 28 Stat. 316 (Pet. App. 342-343). This Court recognized in *Yankton Sioux Tribe* that Article VIII "counsels against finding the reservation terminated," because Congress probably would not have reserved lands for such purposes if it had not anticipated a continuing Reservation. 522 U.S. at 350; accord *Solem*, 465 U.S. at 474. The court of appeals similarly viewed Article VIII as reflecting "Congress' expectation that the federal government would continue to have a significant presence in the area for the welfare of the Tribe," so that "some lands were expected to remain outside of primary state jurisdiction." Pet. App. 240.

Article XVII of the 1894 Act prohibited the sale or offering of intoxicating liquors "upon any of the lands by this agreement ceded and sold to the United States" *and* "upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty." 28 Stat. 318 (Pet. App. 347). As this Court observed in *Yankton Sioux Tribe*, Article XVII "thus signal[s] a jurisdictional distinction between reservation and ceded land." 522 U.S. at 350; see Pet. App. 239-240 (observing that Article XVII "acknowledged the continued existence of two distinct categories of land to which different laws might apply").

Article V of the 1894 Act provided a mechanism for funding, from interest due the Tribe on proceeds from the sale of ceded lands, various post-cession tribal activities, such as the care of "orphans, and aged, infirm, or

other helpless persons of the Yankton tribe," schools and educational programs, and "courts of justice and other local institutions for the benefit of said tribe." 28 Stat. 315 (Pet. App. 341). Article XI provided an additional source of funding for those activities from the sale of lands of tribal members who died intestate. 28 Stat. 317 (Pet. App. 344). The court of appeals recognized that those provisions, which "clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux," militate against a determination that Congress intended to disestablish the Reservation. Pet. App. 239.[4]

The record of the negotiations of the 1892 Agreement between the United States Commissioners and the Yankton Sioux likewise provides no indication of an intent to disestablish the Reservation. The Commissioners repeatedly informed the Tribe during the negotiations that they had one primary purpose—to purchase the Tribe's unallotted surplus lands. Pet. App. 232-234; (citing S. Exec. Doc. No. 27, 53d Cong., 2d Sess. 48 (1894) (Negotiation Record)). That purpose was consistent with the continued existence of a Reservation. As the district court observed, "[a]t no point in the Commissioners' reports is there any mention, by a Commissioner or by a Yankton Sioux, of any anticipated change in the reservation boundaries or of a disestablishment or termination of the Yankton Sioux Reservation." *Id.* at 284.

The negotiation records were submitted to Congress by the Secretary of the Interior to support ratification of the 1892 Agreement. Pet. App. 232. The congressional debates on the ratification did not address the status

[4] As the court of appeals noted (Pet. App. 238-239), the fund referred to in Articles V and XI "was never actually created, but the fact that it was provided for in the statute has relevance on the question of intent."

of the allotted lands within the Yankton Sioux Reservation. See, *e.g.*, 26 Cong. Rec. 6426 (1894) (statement of Rep. Pickler of South Dakota) ("We simply provide in this bill how these 168,000 acres of land acquired from the Indians shall be disposed of."); cf. *Yankton Sioux Tribe*, 522 U.S. at 353 (observing that "[t]he legislative history itself adds little").

Subsequent actions by Congress, and the on-the-ground-facts, likewise do not support a conclusion that the Reservation was disestablished. Pet. App. 244. As the court of appeals explained, Congress's decision in 1929 to return certain reserved lands to the Tribe provides some additional evidence that Congress "always intended" to provide a "property site" for tribal-support activities. See *id.* at 244-245. The Tribe additionally presented uncontested evidence that it maintained a tribal police force and an independent judicial system following passage of the 1894 Act. *Id.* at 246 & n.12.

In sum, the court of appeals correctly concluded that no clear indication of congressional intent to disestablish the Yankton Sioux Reservation could be found in the text of the 1894 Act and the 1892 Agreement, in the legislative history, or in the surrounding circumstances.[5] Pet. App. 241. Not only is there no reason for the Court to revisit that conclusion, but, contrary to the State's contention (State Pet. 36-37), review by this Court would

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[5] The State appears briefly to suggest (State Pet. 24-26) that this Court's decision in *Yankton Sioux Tribe*, in combination with the State's interpretation of the record, demonstrates that the Reservation was, in fact, disestablished. The State misinterprets *Yankton Sioux Tribe*. The Court in that case expressly declined to reach the disestablishment issue, 522 U.S. at 358, and recognized that certain provisions of the 1854 Act cut *against* disestablishment, *id.* at 350. See p. 15, *supra*.

not provide any useful guidance to lower courts in deciding other Indian-country cases. Other cases would necessarily involve different treaties between the United States and the particular tribe; different statutes; different historical circumstances; different subsequent settlement activity; and different treatment of the opened lands by the United States, the State, and the relevant tribe. Cf. *Solem*, 465 U.S. at 469 ("[I]t is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not.") (citations omitted). Certiorari is accordingly unwarranted.

2. Petitioners contend (State Pet. 16-26; County Pet. 16-35; SMRWMD Pet. 6-11) that the court of appeals' decision conflicts with the South Dakota Supreme Court's decision in *Bruguier* v. *Class*, 599 N.W.2d 364 (1999), and with this Court's decision in *DeCoteau* v. *District County Court*, *supra*.[6] Petitioners made the exact same contention in their previous petition for certiorari on the question presented here, which the Court denied. See 99-1490 Pet. 11-20; *South Dakota* v. *Yankton Sioux Tribe*, 530 U.S. 1261 (2000). The contention is mistaken.

a. Contrary to petitioners' assertion of a conflict between the decision below and the Supreme Court of South Dakota's decision in *Bruguier*, the actual holdings of the two cases are identical. Both hold that allotted lands within the exterior boundaries of the original

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[6] The Southern Missouri Recycling and Waste Management District additionally contends (SMRWMD Pet. 11-13) that the court of appeals' decision in this case conflicts with that court's previous decision in *Beardslee* v. *United States*, 387 F.2d 280 (8th Cir. 1967). Even assuming such a conflict existed, it would be for the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Yankton Sioux Reservation now owned by non-Indians do not constitute "Indian country" under 18 U.S.C. 1151, and consequently that the State, not the United States and the Tribe, has primary jurisdiction over crimes committed on those lands.

In *Bruguier*, the defendant was convicted of a state criminal offense for committing a burglary in Pickstown, South Dakota, which is within the exterior boundaries of the original Yankton Sioux Reservation. 599 N.W.2d at 365. He subsequently sought habeas corpus relief, claiming that the offense occurred in Indian country, and thus that the State lacked jurisdiction over him. *Id.* at 365-366. The parties stipulated that the offense occurred on allotted land to which Indian title had been extinguished. *Id.* at 366. The land had been sold in fee to a non-Indian, and was neither trust land, a dependent Indian community, nor property held by the Tribe. *Id.* at 377-378.

In denying habeas relief, the South Dakota Supreme Court reasoned that the 1894 Act disestablished the Yankton Sioux Reservation. *Bruguier*, 599 N.W.2d at 378. But the court's actual holding was limited to the narrower issue presented in the case: whether the land on which the offense was committed constituted Indian country, and thus whether primary jurisdiction over the defendant's crime rested with the United States and the Tribe or, alternatively, with the State. The court acknowledged the limited scope of its holding, stating at the outset of its opinion: "Here we must decide the status of *allotted* lands, which have passed into non-Indian ownership." *Id.* at 365. The court concluded that such lands do not constitute Indian country. *Ibid.*

The court of appeals in this case likewise held that formerly allotted lands that now are owned by

non-Indians "are not part of the Yankton Sioux Reservation and are no longer Indian country." Pet. App. 247; see *id.* at 17. Thus, as the court of appeals recognized, *Bruguier* addressed "a category of land" that the court of appeals had "held was *not* part of a diminished reservation." *Id.* at 23 n.7 (emphasis added). Under the holdings of both the Supreme Court of South Dakota and the Eighth Circuit, the State had primary jurisdiction over the offense at issue in *Bruguier*, and indeed has jurisdiction over offenses on *all* allotted lands that have passed out of trust status and are now in non-Indian ownership.

Nor is any disagreement evident between the court of appeals and the Supreme Court of South Dakota that trust lands within the original exterior boundaries of the Reservation *are* Indian country. The Supreme Court of South Dakota stated that the land at issue in *Bruguier* was not trust land, 599 N.W.2d at 378, and repeatedly recognized that certain lands might be Indian country even without a formal reservation, see *id.* at 370-371, 376, 378. For reasons explained at pp. 24-30, *infra*, federal law does indeed classify the trust lands as Indian country irrespective of formal reservation status.

The decision of the court of appeals in this case thus does not present a "conflict[] with a decision by a state court of last resort," Sup. Ct. R. 10(a), of the sort that warrants this Court's review. The Court has stated that it "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (citation omitted)). Where, as here, there is a difference in reasoning but not result, this Court's intervention is unwarranted.

b. The court of appeals' decision also does not conflict with this Court's decision in *DeCoteau*, which held that another South Dakota Reservation, the Lake Tra-

verse Reservation of the Sisseton-Wahpeton Tribe, had been disestablished.

This Court has cautioned against automatically extending a decision holding that one reservation was disestablished or diminished to another reservation, explaining that the "effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Hagen*, 510 U.S. at 410 (quoting *Solem*, 465 U.S. at 469); see *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (rejecting, as contrary to "basic principles of treaty construction," the argument that "similar language in two Treaties involving different parties has precisely the same meaning," because "the historical record" and "the context of the treaty negotiations" must be examined "to discern what the parties intended by their choice of words"). Here, the text of the surplus land Act and the circumstances surrounding its enactment differ in several significant respects from those in *DeCoteau*.

As for the statutory language, although both surplus land Acts provide for a cession of surplus lands for a sum certain, the 1894 Act concerning the Yankton Sioux Reservation contains provisions that do not have counterparts in the Act of Mar. 3, 1891, ch. 543, 26 Stat. 989 (Sisseton-Wahpeton Act), that ratified the agreement with the Sisseton-Wahpeton Tribe. The Sisseton-Wahpeton Act did not have a provision analogous to Article VIII of the 1894 Act, which reserved from sale to settlers those surplus lands occupied by the United States for Indian agency, school, and other purposes. 28 Stat. 316; see *Yankton Sioux Tribe*, 522 U.S. at 350 (stating that such a provision counsels against finding the Reservation disestablished). The Sisseton-

Wahpeton Act also did not have a provision analogous to Article XVII of the 1894 Act, which expressly prohibited the sale of liquor on both the newly ceded lands and on "any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians." 28 Stat. 318; see *Yankton Sioux Tribe*, 522 U.S. at 350 (suggesting that such a provision draws a "jurisdictional distinction" between ceded lands and reservation lands). Nor did the Sisseton-Wahpeton Act have provisions analogous to Articles V and XI of the 1894 Act, which provided a mechanism to fund schools, courts, and "other local institutions for the benefit of [the] tribe." 28 Stat. 315, 317. Accordingly, the 1894 Act, in contrast to the Sisseton-Wahpeton Act, contemplated a continuing role for the United States and the Tribe in the area and a jurisdictional distinction between ceded and other reservation lands.

As for the surrounding circumstances, the Sisseton-Wahpeton expressed their understanding, with a clarity that the Yankton Sioux did not, that the cession of their surplus lands and the allotment of their remaining lands would terminate their Reservation. As the court of appeals observed, "[t]he background of the Lake Traverse agreement was very different from that of the 1894 Act, * * * because the tribal members there had expressed their clear desire to terminate their reservation." Pet. App. 220-221. For example, this Court noted that spokesmen for the Sisseton-Wahpeton Tribe had stated that "[w]e never thought to keep this reservation for our lifetime," *DeCoteau*, 420 U.S. at 433; that "[w]e don't expect to keep [the] reservation," *ibid.*; and that "[t]his little reservation * * * was given us as a permanent home, but now we have decided to sell," *id.* at 436-437 n.16. In contrast, the "circumstances sur-

rounding the negotiation of the 1892 Agreement with the Yankton Sioux and the difficulty in obtaining tribal votes to ratify it are significantly different, and there was no expression by the Indians of an intent to eliminate their reservation." Pet. App. 221.

Finally, the Sisseton-Wahpeton Tribe negotiated for substantially more allotted acreage per capita than was provided by the Dawes Act or was received by the Yankton Sioux under the 1894 Act. The Dawes Act, pursuant to which the allotments to the Yankton Sioux were made, provided that heads of household were to receive 160 acres, single persons over 18 or orphans were to receive 80 acres, and other persons were to receive 40 acres. Pet. App. 262 (citing 24 Stat. 388). In contrast, each Sisseton-Wahpeton member, "regardless of age or sex," received a 160-acre allotment. *DeCoteau*, 420 U.S. at 435; see *id.* at 438 n.19 (quoting the Senate Committee Report on the Sisseton-Wahpeton agreement as explaining that "the departure from the general allotment act of 1887 in the case of these Indians is just and proper," principally because "the additional allotments are in lieu of any residue which, under their title, these Indians could have reserved for the future benefit of their families"). The court of appeals thus recognized that the agreement in *DeCoteau* differed significantly from the agreement here, because the Sisseton-Wahpeton, in "exchange" for the termination of their Reservation, "negotiated allotments for each individual, including married women." Pet. App. 221. The Yankton Sioux did not.[7]

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[7] The State argues (State Pet. 22) that present-day demographics also show a similarity between this case and *DeCoteau*. Even assuming present-day demographic evidence could suffice to show disestablishment in 1894, the State misinterprets the significance of the evidence

In sum, given the significant differences in the language of the surplus land Acts involving the Yankton Sioux Reservation and the Lake Traverse Reservation as well as in the circumstances surrounding their enactment, no conflict exists between the decision below and this Court's decision in *DeCoteau*.

3. The question presented by petitioners regarding the Reservation's disestablishment does not merit review for the additional reason that it is of little practical consequence. The only lands that the court of appeals found to be Indian country under 18 U.S.C. 1151(a) based on their reservation status were (1) allotted lands held in trust by the United States for tribal members; (2) lands acquired by the United States since 1934 and held in trust for the Tribe pursuant to the IRA; and (3) lands that were ceded to the United States under the 1894 Act but reserved for Indian "agency, schools, or other purposes," were later returned to the Tribe, and are now held in trust by the United States for the benefit of the Tribe. See p. 11, *supra*. All of these lands would be Indian country even if the Reservation *had* been disestablished, as petitioners contend.[8]

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here. As the figures cited by the State demonstrate, whereas Indians were less than 10% of the relevant population in *DeCoteau*, they make up roughly one-third of the population here. See Pet. App. 315 (district court emphasizing demographic differences between this case and *DeCoteau*).

[8] To the extent that the State's criticism (State Pet. 26-35) of the court of appeals' decision could be read to touch upon these alternative grounds for Indian-country status, such arguments are not encompassed within the question presented in the State's petition, which seeks review only of "[w]hether the Act of 1894 disestablished the Yankton Sioux Reservation." State Pet. i.

a. The vast majority of the land at issue (over 30,000 acres) falls within the first category enumerated above: allotted lands held in trust for tribal members. Pet. App. 12-13. Petitioners conceded below that even if this land were not reservation land under Section 1151(a), it would still be Indian country under Section 1151(c), which expressly addresses allotments. See *id.* at 28, 226. The State argues (State Pet. 27) that resolution of the disestablishment question is still important to the status of these lands, because, if there is no reservation, then these lands would cease to be Indian country if they were ever removed from trust status. But as a practical matter, very little of this land has been removed from trust status in recent years, and there is little reason to expect that much, if any, of it will be in the near future. See Gov't C.A. App. 175-197 (less than one allotment has been removed from trust in each of the last two decades).

b. Most of the land at issue that does not fall into the first category falls within the second: some 6000 acres of lands placed into trust under the IRA. Pet. App. 12-13. The court of appeals correctly concluded that this category of land is Indian country whether or not the formal Reservation was disestablished. *Id.* at 36-37. The IRA authorizes the Secretary of the Interior to acquire "land for Indians" "within *or without* existing reservations." 25 U.S.C. 465 (emphasis added). The court of appeals recognized, quoting this Court's decision in *City of Sherill* v. *Oneida Indian Nation*, 544 U.S. 197, 221 (2005), that the IRA "provides the proper avenue for a tribe to reestablish sovereign authority over territory." Pet. App. 36 (brackets omitted); see *id.* at 36-37 (citing *Chase* v. *McMasters*, 573 F.2d 1011, 1018 (8th Cir.), cert. denied, 439 U.S. 965 (1978); *United States* v.

Roberts, 185 F.3d 1125, 1131 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000); and *Langley* v. *Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985), for the proposition that IRA trust lands are Indian country). Petitioners do not challenge that conclusion in their identical questions presented, and nothing this Court decides on the disestablishment issue on which petitioners do seek review would place these lands within state jurisdiction.[9]

c. The third category of land at issue—roughly 900 acres of "agency trust land," reserved for the Tribe's benefit in 1894 and restored to the Tribe under the 1929 Act—comprises less than three percent of the total land, Pet. App. 12-13, and thus would not by itself merit this Court's attention. In any event, this land would qualify as an "informal" or "de facto" reservation under this Court's precedents, even if no formal Reservation existed. In *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991), this Court considered the status of lands that were not within the boundaries of a formally recognized reservation but that were held in trust by the United States for the benefit of a tribe. The Court concluded that, because the trust land was "validly set apart for the use of the Indians as such, under the superintendence of the Government," the trust land "qualifie[d] as a reservation." *Ibid.* (citation omitted); see *United States* v. *John*, 437 U.S. 634, 649 (1978) (observing that "[t]here is no apparent reason why these [trust] lands, which had been purchased [by the United States] in previous years for the aid of those Indians, did not become a 'reservation,' at least for the purposes of federal criminal juris-

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[9] As noted below, see p. 27, *infra*, these lands also meet the standards for an informal reservation more generally.

diction at that particular time"); see generally *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (recognizing that Indian reservations, for purposes of 18 U.S.C. 1151(a), may be either "formal" or "informal").

The district court expressly recognized that the other two categories of land at issue in this case—the allotted trust lands and IRA trust lands—meet the standards for an informal reservation. Pet. App. 153-157. The district court concluded, based on the evidence presented, that "the federal government has validly set apart" those lands "for use of the Yankton Sioux Indians," observing that the federal Bureau of Indian Affairs handles leases and rents, and the Federal Bureau of Investigation exercises criminal jurisdiction, over that territory. *Id.* at 156. Similar considerations demonstrate that the agency trust land meets the standards for an informal reservation as well: the land was reserved for the purpose of providing "aid and education to tribal members so long as they were needed," *id.* at 21 (citation omitted); see 28 Stat. 316 (Pet. App. 342-343); was later "reinvested in the Yankton Sioux Tribe" when "no longer required for agency, school, and other purposes," Act of Feb. 13, 1929, ch. 183, 45 Stat. 1167; was exempted from allotment, thereby preventing its transfer to non-Indians, *ibid.*; see 69 Cong. Rec. 8837 (1928) (Sen. McMaster of South Dakota explaining that the lands would not be vulnerable to sale for taxes, and instead that the act would reinvest the lands "not for allotment but for reservation purposes, buildings, and so forth"); is held in trust for the Tribe with federal superintendence of leasing; and has been subject to federal criminal jurisdiction, Pet. App. 246.

d. Moreover, any tribal trust lands determined not to constitute either a formal or informal reservation under Section 1151(a) would satisfy the requirements of Section 1151(b) as a dependent Indian community. The district court expressly recognized that the federal government's treatment of the allotted trust lands and IRA trust lands qualified them as dependent Indian community under this Court's decision in *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520, 530 (1998). See Pet. App. 159-160. The analogous treatment of the agency trust land would similarly qualify it as dependent Indian community as well.

e. Because the lands in question would be Indian country if the formal Reservation no longer existed, there is no merit to the State's contention (State Pet. 35) that the court of appeals' decision has "created an untenable situation for those who must attempt to live in and govern the disputed area." Petitioners and amici raised a similar argument in support of rehearing below. Pet. App. 59. The court of appeals, in denying that request, quoted the government's observation that "despite a decade of experience with a * * * checkerboard Reservation" after the court of appeals' original ruling that the Reservation had not been disestablished, "this area of South Dakota has not experienced any of the problems described by the State, County, or *amici*." *Ibid.* (citation omitted).

In point of fact, because of the alternative grounds for Indian-country status of the lands at issue, the checkerboard pattern pre-dates the court of appeals' ruling on disestablishment, and would survive any decision on that issue by this Court. See, *e.g.*, Pet. App. 245-246 (noting longstanding federal exercise of criminal

jurisdiction over trust lands).[10] As this Court has previously recognized, a checkerboard jurisdictional pattern is not necessarily impracticable. See *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 265 (1992) (parcel-by-parcel determinations that state's tax assessor was required to make on checkerboard reservation were "not impracticable" and "do not differ significantly from those he must make off the reservation, to take account of immunities or exemptions enjoyed, for example, by federally-owned, state-owned, and church-owned lands"). And the evidence in this case—which shows that the federal government has long exercised criminal jurisdiction over lands found by the court of appeals to constitute part of the Yankton Sioux Reservation—demonstrates that the pat-

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[10] One amicus brief implies that the question presented nevertheless has relevance because the Tribe's regulatory authority differs depending upon whether the land at issue is Indian country under Section 1151(c) or because it is part of a reservation. See Charles Mix Electric Ass'n et al. Amicus Br. 10-11. None of the cases cited by the brief, however, expressly discusses Section 1151(c), and the brief omits to discuss whether the other alternative grounds (*e.g.*, informal-reservation status) for considering this land to be Indian country might also give rise to differences in tribal regulatory authority. *Ibid.* The courts below neither addressed nor recognized any relevant jurisdictional distinctions between different types of Indian country, and no such issue is presented for this Court's review. In any event, this Court's precedents suggest that the precise type of Indian country does not matter for jurisdictional purposes. The same general principles of immunity from state taxation apply, for example, on any land that constitutes Indian country, whether the land is a formal reservation, see *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 179-181 (1973); is held in trust for a Tribe but is not part of a formally designated reservation, see *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 511; or is an allotment still held in trust or restricted status, see *Sac & Fox Nation*, 508 U.S. at 123.

tern here has not proven to be unworkable. Pet. App. 245-246. For that reason, and because the current jurisdictional boundaries should remain irrespective of a decision by this Court on the question presented, certiorari is unwarranted.

4. Petitioners, and some of their amici, suggest that certiorari is necessary in order to address the status of an additional category of land, namely, allotted land that passed into non-Indian hands after 1948, when 18 U.S.C. 1151 was enacted. See State Pet. 34-35; County Pet. 19; Cities' Amicus Br. at 1 n.2 & App.; Colin Soukup et al. Amicus Br. 4-5; Wagner Community Sch. Dist. Amicus Br. 2. But as the court of appeals made clear in response to the rehearing petitions, no issue regarding such land was "actually litigated or decided in this case." Pet. App. 55. Indeed, the panel revised its original opinion to eliminate any possible implication that any such issue had been decided. *Id.* at 56. Because this is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), petitioners' arguments about this fourth category of land provide no reason to grant certiorari.

5. Finally, should the Court nevertheless decide to grant certiorari to address the disestablishment question, it should deny the Tribe's conditional cross-petition. The conditional cross-petition presents the question whether the present-day Reservation includes all lands that were within the original 1858 Reservation boundaries, except for those ceded to the United States in the 1894 Act. See Conditional Cross-Pet. i. The additional lands at issue in the Tribe's conditional cross-petition are once-allotted lands that passed out of trust status and were sold to non-Indians. The United States has long exercised jurisdiction only over trust lands, not

these. Pet. App. 246-247. Although the United States supported the Tribe's position on this issue, the question does not warrant certiorari. Like the disestablishment issue presented by petitioners, the issue the Tribe raises involves only the application of settled law to this particular case. See Sup. Ct. R. 10. There is no need to review the disestablishment question, but even if the Court did grant review of that question, there would be no need to expand the scope of review to include other aspects of the court of appeals' reservation-specific and fact-bound ruling.

As the court of appeals observed, "both sides have followed an all or nothing strategy" in this case. Pet. App. 248. The outcome now lies between those poles in a manner that essentially preserves the jurisdictional status quo as it has long existed. Review of any or all of the court of appeals' decision is unwarranted and would serve little purpose. The Court therefore should deny certiorari, just as it did 11 years ago when petitioners and the Tribe filed certiorari petitions raising the same issues at an earlier stage of this litigation.

CONCLUSION

The petitions for writs of certiorari should be denied. If any of the petitions are granted, the conditional cross-petition should be denied.

Respectfully submitted.

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Nos. 10-929, 10-931, 10-932, and 10-1058

In The
Supreme Court of the United States

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE, et al.

SOUTHERN MISSOURI RECYCLING
AND WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE, et al.

PAM HEIN, STATE'S ATTORNEY
OF CHARLES MIX COUNTY, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE, et al.

YANKTON SIOUX TRIBE, et al.,
Cross-Petitioners,

v

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, et al.

On Conditional Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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INTRODUCTION

The Yankton Sioux Tribe, in its Conditional Cross-Petition (CCP), argues that, if South Dakota's Petition in No. 10-929 is granted, bringing the question of whether the Yankton Sioux Reservation has been disestablished before the Court, it should be allowed to argue for its preferred configuration of a diminished reservation.

The Tribe has indicated that it will argue for its diminished reservation configuration on the same evidence which the State contends supports disestablishment. CCP 4. For the reasons set forth below, and in the State's Petition in No. 10-929, the Tribe's position on the merits is mistaken. The United States, in seeming agreement that the Tribe's position lacks merit, now urges denial of this Conditional Cross-Petition. Brief for the United States in Opposition, Nos. 10-929, 10-931, 10-932, and 10-958 at 32. Nonetheless, the equities and practicalities of the situation persuade the State to support the grant of this Conditional Cross-Petition, in the event that the Petition in No. 10-929 is also granted, to allow the full range of arguments to be presented.

STATEMENT OF THE CASE

In 1858 a "Yankton Sioux Reservation" of roughly 430,000 acres was created out of a larger territory. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 334 (1998). The reservation area was then subjected

to allotment pursuant to the Dawes Act and a subsequent act. *Id.* at 336. Roughly 262,000 acres were removed from common ownership and allotted to individual Indians; 168,000 acres were unallotted, and remained in common ownership. *Id.* This "unallotted" land was the "surplus land."

A Yankton Indian Commission was appointed in 1892 and, that same year, negotiated a "cession and sum certain" agreement with the Yankton Sioux Tribe by which the Tribe agreed to cede all of its unallotted land then held in common (the 168,000 acres known as "surplus land") for a sum certain of $600,000. 1894 Act, Articles I and II, Pet. App., No. 10-929 at 339. As a consequence, the Tribe retained no land in common. *Id.*; *Gaffey II*, Pet. App., No. 10-929 at 229-30. Because individual tribal members quickly disposed of their allotments and the United States itself sold allotments of deceased and incompetent Indians, the acreage held by individuals in allotted status declined from 262,000 acres to 43,358 acres by 1930. *State v. Greger*, 559 N.W.2d 854, 867 (S.D. 1997). By the time of the first trial in 1995, 232,000 of the original 262,000 acres of allotted land had been transferred in fee to non-Indians; the Tribe had acquired about 6,000 acres. *Yankton Sioux Tribe*, 522 U.S. at 339.

The Tribe's Question Presented asks this Court to recognize a "reservation" frozen in 1894, excluding only the surplus ceded land (on the basis of this Court's decision in *Yankton Sioux Tribe*, 522 U.S. at 358) but including all 262,000 acres of allotted land,

even though the Indian title to 88 percent of those lands has been extinguished and the lands have been conveyed to non-Indians. The result would be a "reservation" which would include roughly 30,000 acres of allotted lands owned by tribal members and 230,000 acres of lands owned by non-Indians. These parcels would be intermixed with the 168,000 acres of land ceded to the United States, acquired by non-Indians, and declared to be non-reservation by this Court in *Yankton Sioux Tribe*.

As unlikely as the configuration seems, it has appeared before, in very similar form, in this litigation. Immediately after this Court's decision in 1998, the Bureau of Indian Affairs apparently conceived it, and the District Court, at the urging of the Tribe and the United States, adopted a reservation configuration which consisted mainly of the allotted lands. *Gaffey I*, Pet. App., No. 10-929 at 253, 318-20. The Eighth Circuit, however, quickly overturned this decision. *Gaffey II*, Pet. App., No. 10-929 at 249. It is notable that, insofar as appears from the record, no map of this configuration had been prepared until after this Court's decision in *Yankton Sioux Tribe* in 1998. Even now, the Tribe fails to present a map to this Court which identifies the lands which it asserts would constitute "reservation" under the theory of the Conditional Cross-Petition.

DISCUSSION

The Tribe's Conditional Cross-Petition asks this Court to create a reservation configuration unknown to Indian law. Even so, the State does not object to the grant of the Petition, in the event that the State's Petition in No 10-929 is granted, because, as the Tribe asserts, the arguments made in its Conditional Cross-Petition substantially overlap the arguments made by the other parties, and the Court's final determination may well benefit from consideration of all potential points of view.

A. The relief sought through grant of the Conditional Cross-Petition would create a configuration of a "reservation" never before seen in the law.

The reservation configuration sought by the Conditional Cross-Petition is unique. Except for the one year and two weeks in which the 1998 District Court's opinion, which adopted this "reservation," was effective, the Conditional Cross-Petitioners have not identified a single case, nor did the courts below, in which Congress was found to have created a "reservation" without external boundaries, which was comprised of roughly 90 percent fee land, 10 percent trust land of some kind, and intermingled with over 160,000 acres of non-reservation ceded land.

B. The Conditional Cross-Petition fails to articulate a coherent theoretical basis for granting the relief it seeks.

This case, from the first, has addressed the question of whether the Yankton Sioux Reservation has been disestablished or, at the least, diminished This Court, in its 1998 decision, determined that the reservation *has* been at least diminished, and the exterior boundaries extinguished, by determining that the surplus land ceded to the United States by the 1894 Agreement was no longer "reservation." *Yankton Sioux Tribe*, 522 U.S. at 345, 347, 358. This Court found, however, that it "need not determine whether Congress disestablished the reservation altogether in order to resolve this case." *Id.* at 358. As demonstrated below, the opinions of this Court nonetheless illuminate the path which should be taken to ultimately resolve this case.

1. The operative language of the Yankton Agreement is precisely suited to "termination" but the Conditional Cross-Petition fails to even acknowledge that language.

The language of a surplus land agreement is the most important factor in determining whether disestablishment has taken place, and of that language, the "operative language" is of primary significance. *See Yankton Sioux Tribe,* 522 U.S. at 333; *Hagen v. Utah,* 510 U.S. 399, 412-14 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 593 n 15, 608 (1977).

The "operative language" of the Yankton Agreement is its "'cession' and 'sum certain' language" which this Court held is "'precisely suited' to terminating reservation status." *Yankton Sioux Tribe*, 522 U.S. at 344 (quoting *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975)). Virtually identical operative language in an 1891 Act had been held to disestablish the Lake Traverse Reservation in *DeCoteau*. For the Conditional Cross-Petition to succeed, it must, at a minimum, articulate a compelling reason to ignore the Yankton Agreement's operative language and this Court's interpretation of that language. The Conditional Cross-Petition fails to do so, because it fails even to *acknowledge* this language.[1]

2. The subsidiary language in the Yankton Agreement does not significantly undermine its operative language.

Instead of confronting the "operative language" of the 1894 Act, the Conditional Cross-Petition improperly assigns three other sections of the Act primary significance. CCP 13-14. This approach ignores *Yankton Sioux Tribe's* comparative analysis of the

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[1] The Tribe in its Brief in Opposition, Nos. 10-929, 10-931, 10-932, likewise fails to directly address the "cession and sum certain" language but does argue, *id.* at 13, that the "text of the 1894 Act" applied only to "'ceded'" lands, a clear error given that this Court and the Eighth Circuit have both found that the 1894 Act removed the 1858 reservation boundaries. *Yankton Sioux Tribe*, 522 U.S. at 345, 347; *Gaffey II*, Pet. App., No. 10-929 at 203, 223, 224, 248.

effect of subsidiary and operative language in a cession agreement. In *Yankton Sioux Tribe*, the United States and the Tribe had "rest[ed] their argument" on the "saving clause in Article XVIII of the 1894 Act." 522 U S. at 345. This Court, however, refused to give the "savings clause" such effect and limited it to preservation of annuities. *Id.* at 347-48. The Court's decision emphasizes the primacy of operative language even over very strong language in other subsidiary provisions, contrary to the position of the Conditional Cross-Petition.

In any event, the subsidiary provisions relied upon do not carry the weight assigned to them. The Conditional Cross-Petition argues that Article V of the 1894 Act provides for "continued funding of tribal courts of justice and other local institutions" and then strongly implies that this Court found "that provision" i.e., Article V, "reflects an expectation that the Tribe would maintain a sovereign existence" and so "'counsel[s] against finding the reservation terminated.'" CCP 13 (quoting *Yankton Sioux Tribe*, 522 U.S. at 350). In fact, *Yankton Sioux Tribe*, 522 U.S. at 350, does *not* discuss Article V, nor does Article V appear even to be mentioned in *Yankton Sioux Tribe*. Furthermore, Article V itself does *not* refer to "tribal courts of justice," as CCP 13 claims. *See* 1894 Act, Art. V, Pet. App., No. 10-929 at 340-41. Rather, Article V refers to "courts of justice and other local institutions," *Id.* The reference is thus to support of "local," i.e., city, county and state, and not "tribal" courts,

contrary to the position of CCP 13. *Cf. South Dakota v. Bourland*, 508 U S. 679, 697, n.16 (1993).

Next, the Conditional Cross-Petition relies on Article VIII which "reserved from sale to settlers" certain lands which had been "ceded" to the United States but were then "occupied by the United States for agency, schools and other purposes." CCP 13. *See* 1894 Act, Art. VIII, Pet. App., No. 10-929 at 342-43. The lands could be sold to settlers after they were "no longer required for such purposes." *Id.* at 343. The Tribe urges that Article VIII somehow demonstrates the continued existence of a "reservation" but the argument fails. Retention of such areas was "common, even for a terminated reservation." *Bruguier v. Class*, Pet. App. 10-929 at 187. Similar agency and school lands were reserved at the Lake Traverse or Sisseton Reservation, yet it, like areas of other reservations, was found disestablished. *See DeCoteau,* 420 U.S. at 435 n.16, 438 n.19; *Bruguier*, Pet. App. 10-929 at 187. *See also Rosebud*, 430 U.S. at 622 (Marshall, J., dissenting and referring to allowance for reservation of land in disestablished counties for "Indian schools, religious missions and service agencies"); *United States v. Pelican*, 232 U.S. 442, 446 (1914) (reservation of "school and mill lands" in area removed from reservation); 36 Stat. 440 (1910) (allowing, in Section 1, Secretary to reserve lands for "agency, school and religious purposes" in the area of Pine Ridge Reservation later held disestablished in *United*

States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975)).

Further, the "agency" lands were "unallotted" and "ceded," 1894 Act, Article I, Pet. App., No. 10-929 at 339; *Gaffey II*, Pet. App., No. 10-929 at 209, and this Court has found that "unallotted lands ceded" to the United States did not retain "reservation" status. *Yankton Sioux Tribe*, 522 U.S. at 342. Lands effectively declared to be *non-reservation* could hardly support the existence of a "reservation."

In addition, the Conditional Cross-Petition elevates the significance of the temporary retention of surplus lands. Such retention merely indicated that the United States perceived that it retained a responsibility to tribal members on the remaining "allotted lands" and in the area of the former reservation and that it would continue to supply services to them. *See Pelican*, 232 U.S. at 449-50. That is not enough to support the existence of a "reservation." As *Alaska v. Native Village of Venetie Tribal Government* found, the "mere provision of 'desperately needed' social programs" cannot support a finding of Indian country. 522 U.S. 520, 534 (1998). *See also* Report of Agent for Sisseton Agency (1900) (referencing, in 1900, at the Lake Traverse or Sisseton Reservation, disestablished nine years before in 1891, an "industrial boarding school," an "office" for the agent, and services provided by the

agency related to leasing and policing. 1998 JA 666-67.[2]

Finally, the Conditional Cross-Petition cites Article XVII, the liquor provision, as demonstrating the existence of a "reservation." CCP 13. *See* 1894 Act, Art. XVII, Pet. App., No. 10-929 at 347. This argument ignores the fact that this Court found that a similar liquor provision *supported* the disestablishment of Mellette County from the Rosebud Sioux Reservation. *Rosebud Sioux Tribe*, 430 U.S. at 613 n.47. The Conditional Cross-Petition also ignores the fact that liquor had been illegal in Indian country since 1832. Testimony of Herbert Hoover, 1995 Transcript at 73. Article XVII was unnecessary if the status of the lands had not been altered from reservation to non-reservation by the 1894 Act.

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[2] The Tribe at CCP 6 mischaracterizes the agency lands, labeling them "reserved agency trust lands" in 1929. These lands, however, had been ceded to the United States and were assuredly not in "trust" from 1894 until at least 1929. Indeed, the Solicitor found that the lands had been conveyed to the United States in 1894 "free and clear of all claims of the Indians." Opinions of the Solicitor, M-27671 (Mar. 1, 1934), 1998 JA 571 (Citations to documents follow the form set out in Petition, No. 10-929, at 5 n.2).

3. The relinquishment of all tribal land in common signaled the loss of a "critical component of reservation status" and not the retention of "reservation" status.

The Conditional Cross-Petition argues that the mere creation of allotments and the desire expressed by Government negotiators that individual Indians would retain their allotments signaled retention of "reservation" status. CCP 13-14. This approach misinterprets the occurrences of the late 1800's and the critical role of "land in common." After 1858, the Tribe held roughly 430,000 acres of land in common. Allotment is the process whereby the United States accomplished the permanent transfer of the part of the tribal land held in common to individual Indians. *Gaffey II*, Pet. App., No. 10-929 at 209-10; Nell Newton, Editor, *Cohen's Handbook of Federal Indian Law* (2005 Edition). Allotment diminished the area of land held in common by the Tribe by 262,000 acres. *See Yankton Sioux Tribe*, 522 U.S. at 336. The United States then obtained the "cession" of the remainder of the land in common – 168,000 acres – by way of a "sum certain" agreement in 1894. 1894 Act, Arts. I and II, Pet. App., No. 10-929 at 339. Therefore, after 1894, the Tribe retained *no* land in common. *Id.*; *Gaffey II*, Pet. App., No. 10-929 at 229-30. This is critical because, as *Yankton Sioux Tribe* finds, by failing to retain any land in common, a "critical component of reservation status" was lost. 522 U.S. at 346. Allotment and cession of land held in common worked in tandem to eliminate this critical

component of "reservation" status. *See id.*; *Bruguier*, Pet. App., No. 10-929 at 182-85.

The approach of the Conditional Cross-Petition also confuses the function and history of an "allotment" with that of a "reservation." While both are "Indian country," an "allotment" and a "reservation" are not the same. "Reservation" lands retain their reservation status regardless of their ownership; "allotments" on the other hand, retain their allotted status only so long as their "Indian title" is retained. 18 U.S.C. §§ 1151(a), (c). As *Venetie* finds, "allotments" are "parcels of land created out of a diminished Indian reservation and held in trust . . . for the benefit of individual Indians." 522 U.S. at 529. In the case of the Yankton area, the steady historical increase in state jurisdiction is the story of the surrender of 220,000 acres of individual allotments and their loss of "Indian title." *See Bruguier*, Pet. App., No. 10-929 at 190-94. *See also Yankton Sioux Tribe*, 522 U.S. at 357. The attempt of the Conditional Cross-Petition to make an allotment equivalent to a "reservation" should fail.

The Conditional Cross-Petition also incorrectly implies that the Government made a determined effort to cause tribal members to retain their allotments and that this somehow signaled "reservation" status for the allotments. The record shows, to the contrary, that roughly 230,000 acres of the original 262,000 acres of allotted land have left allotted status. *Yankton Sioux Tribe*, 522 U.S. at 339. Not only did tribal members quickly dispose of their allotments,

but the United States itself actively sought the end of allotted status through the regular sales of inherited lands and lands of non-competents to non-Indians, 1998 JA 821-34, through the so-called federal forced fee policy, 1995 Transcript 232; 1998 JA 920-23, by allowing the twenty-five year trust period to expire, 1998 JA 1163-64, and otherwise.

C. The jurisdictional history of the area is inconsistent with reservation status.

The Conditional Cross-Petition is bereft of evidence or even argument regarding the jurisdictional history of the lands for which it seeks to establish "reservation" status, although such history is important in the analysis. *See Yankton Sioux Tribe*, 522 U.S. at 357; *Rosebud*, 430 U.S. at 603-05. The federal and state courts have consistently found that the State, not the federal government or the Tribe, has exercised jurisdiction over non-Indian fee lands within the former boundaries. *See Yankton Sioux Tribe*, 522 U.S. at 357; *Gaffey II*, Pet. App., No. 10-929 at 245-47; *Bruguier*, Pet. App., No. 10-929 at 190-92. The tribal proposal, if adopted by this Court, would radically alter these arrangements and the State would be deprived of jurisdiction over all of the lands held in allotted status in 1894, even though over roughly 230,000 acres of former allotted land are now held in fee by non-Indians. Indeed, even the United States acknowledges that it has "long" not exercised

jurisdiction over non-trust lands. Brief for the United States in Opposition, Nos. 10-929, 10-931, 10-932, and 10-1058, at 30-31.

The Tribe's argument is doubly weakened in that, until recently, the Tribe itself had claimed only a small amount of land or reservation. Its 1962 Constitution "defines the Tribe's territory to include only those tribal lands within the 1858 boundaries 'now owned' by the Tribe." *Yankton Sioux Tribe*, 522 U.S. at 357 (quoting Constitution and Bylaws of the Yankton Sioux Tribal Business and Claims Committee, Art. VI, § 1). Only in 1990, almost a century after the 1894 Act, did the Tribe amend its Constitution to claim "all lands and waters . . . within the exterior boundaries of the 1858 Treaty" 1998 JA 1129.[3]

CONCLUSION

The State has respectfully requested this Court to grant certiorari in its Petition in No. 10-929. The State agrees that grant of the Conditional Cross-Petition is appropriate in the event that its Petition is granted, in that such a grant will enable all parties to

[3] The Tribe is incorrect insofar as it asserts, without citation of evidence, that all the parties have become "adjusted" to the Eighth Circuit ruling CCP 3, 11 That much is clear from the Amicus Briefs already submitted. The assertion, moreover, undermines, rather than supports, the grant of the relief requested by this Conditional Cross-Petition.

offer the most complete analysis of the facts and law possible.

Respectfully submitted,

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SIOUX TRIBE,
IVIDUAL MEMBERS,

Cross-Petitioners,

v.

DENNIS DAUGAARD, GOVERNOR OF
A DAKOTA; MARTY J JACKLEY,
NEY GENERAL OF SOUTH DAKOTA;
RN MISSOURI RECYCLING AND WASTE
GEMENT DISTRICT; PAM HEIN, STATE'S
RNEY OF CHARLES MIX COUNTY, ET AL.,

Cross-Respondents

On Conditional Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT CHARLES MIX COUNTY IN RESPONSE TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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In the process of fashioning a thirty-seven thousand (37,000) acre noncontiguous reservation out of whole cloth, the lower courts have once again ignored the very strong presumption of cession and diminishment or disestablishment set forth in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), confirmed in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), and reiterated in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998) A review of the Yankton Sioux Tribe's Conditional Cross-Petition for a writ of certiorari confirms that the Tribe has followed the lead of the lower courts in this respect. In addition, the Yankton Sioux Tribe further asserts that the 1858 reservation has only been reduced to the extent of the ceded lands. As a result, the Tribe disagrees with the court of appeals and claims another 230,000 acres of noncontiguous fee lands (former allotments), owned and populated by non-Indians, to constitute an 18 USC §1151(a) noncontiguous Yankton Reservation.

The Tribe is clearly mistaken on all counts. Nevertheless, the County joins the State in supporting the grant of the Tribe's Conditional Cross-Petition in the event that certiorari is granted in Nos. 10-929, 10-931, and 10-932.

Moreover, the County continues to believe that this case is particularly suited for some type of summary disposition. On this point, the County relies on the detailed rationale set forth by the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), which adhered fully to the principles set forth in *DeCoteau*, *Rosebud Sioux Tribe* and *Yankton*

Sioux Tribe to hold that Congress had disestablished the Yankton Reservation in 1894.

That was not an easy task in *Bruguier* in the face of consistent efforts in the federal courts to put every single acre of trust land in reservation status, at any cost. Nor is *Bruguier* fact bound in any respect. This Court should recognize the efforts of the South Dakota Supreme Court in *Bruguier*, as this Court did in *DeCoteau*, 420 U.S. at 428-431, *Rosebud Sioux Tribe*, 430 U.S. at 603 n.26, and *Yankton Sioux Tribe*, 522 U.S at 342 n.4. In this case, however, that recognition could appropriately be in the form of a summary order that vacates the opinion of the court of appeals for further consideration.

SUMMARY

This case can be summarized simply. When the issue regarding the status of the Yankton Sioux Reservation was before this Court in *Yankton Sioux Tribe*, a unanimous Court provided the federal district court and the court of appeals with an opportunity. It was an opportunity to address a legitimate issue after having previously adopted an absurd result resurrecting 1858 reservation boundaries long deemed disestablished. The legitimate issue was whether the Yankton Sioux Reservation had been wholly disestablished. The decisions of the district court and the court of appeals since that time do not reflect an appreciation of that opportunity or a proper

respect for the principles reflected in the decisions of this Court.

In the remand, the district court simply ignored that *Yankton Sioux Tribe* held that the 1858 boundaries were disestablished. The district court resurrected the 1858 reservation boundaries again. The district court also held that all the land except the ceded lands was within those 1858 boundaries. As a result, two hundred thirty thousand (230,000) acres of formerly allotted non-Indian fee land was also within those boundaries.

The court of appeals reversed the district court on the 1858 boundary question. The court of appeals recognized that *Yankton Sioux Tribe* squarely held that the 1858 reservation boundaries were disestablished

As a result, the court of appeals also reversed the district court with respect to the reservation status of the two hundred thirty thousand (230,000) acres of formerly allotted non-Indian fee land. Formerly allotted non-Indian fee lands were not within the limits of the 1858 reservation boundaries because this Court held the 1858 reservation boundaries were disestablished. As a result, the court of appeals held that Congress foresaw this result.

The court of appeals mistakenly recognized the agency lands as a "reservation." At the time, even the United States recognized that the court of appeals did not "articulate its rationale for that determination." Brief for the United States in Opposition, *Yankton*

Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000) (Nos. 99-1490 and 99-1683), at 20. As a result of this reservation, the court of appeals remanded the case back to the district court for a *third* time, to document the reservation status of the rest of the trust land.

Not surprisingly, the district court held that all of the trust land (37,000 acres) should be designated as a reservation under any one of several alternative theories.

The court of appeals affirmed the district court on every acre and every alternative reservation status theory. In addition, the court of appeals, on its own notion, thought thousands of acres of fee land should also be within the reservation, despite previously limiting the scope of the remands to trust land and despite previously holding that none of the formerly allotted non-Indian fee lands were within the limits of the reservation. On rehearing, the offending footnote regarding fee lands was deleted from the opinion. Order on Petitions for Rehearing of the United States Court of Appeals for the Eighth Circuit, *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), County App. I, 52-70.

ARGUMENT

The County submits that *omissions* in the Tribe's Conditional Cross-Petition are more significant in

assessing the arguments of the Tribe than anything else in the Cross-Petition.

1. The fundamental omission centers around the failure of the Tribe to address the almost irrebuttable presumption of disestablishment that controls the manner in which the *Yankton* cession must be construed. The unanimous opinion in *Yankton Sioux Tribe* repeatedly references this "very strong" cession presumption. *Yankton Sioux Tribe* at County App. II, 343, Transcript of Oral Argument, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 351 (1998) (No. 96-1581), County App. II, 842. Not surprisingly, the lower federal courts either erroneously restrict the scope of the presumption (limited to ceded land rather than area of reservation ceded) or fail to mention it altogether. *Yankton Sioux Tribe*, 522 U.S. at 338 n.2, County App. I, 333-334. Like the United States, the Yankton Sioux Tribe has also neglected the significance of the presumption.

2. A related significant omission in the Tribe's Conditional Cross-Petition is the failure to cite, let alone discuss, the leading precedent in cession and disestablishment cases: *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). Because of the time and effort this Court expended on extensive opinions in *DeCoteau*, 420 U.S. 425 (1975) (43 pages), and *Rosebud Sioux Tribe*, 430 U.S. 584 (1977) (49 pages), developing and clarifying this "very strong" cession presumption, it is truly remarkable that the Tribe's Conditional Cross-Petition fails to address or even

cite either the presumption or the cases. Transcript of Oral Argument, *Yankton Sioux Tribe* (No. 96-1581), County App. II, 842. This is especially so because the cases and the presumption were cited *repeatedly* by the Court in *Yankton Sioux Tribe*.

a. Several citations confirm this point and all conflict with the decision of the court of appeals and the arguments of the Yankton Sioux Tribe in the Cross Petition. The brief submitted by the Native American Rights Fund in *Rosebud Sioux Tribe* on behalf of the National Congress of American Indians clearly confirms the Native American Rights Fund reliance on *DeCoteau*'s discussion of cessions like the Sisseton and Yankton cessions for the proposition that cessions disestablish reservations.

The Native American Rights Fund, signatory to the Conditional Cross-Petition, has, like the United States, substantially shifted its position. At one time the Native American Rights Fund clearly recognized that a cession and sum certain agreement terminated a reservation. In the *Rosebud Sioux Tribe* case, for example, it stated:

> In the *DeCoteau* case, the Court found that an outright sale of all unallotted lands for present consideration terminated the reservation.

Brief of *Amici Curiae* of the National Congress of American Indians, et al., *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562), at 6-7.

The position of the Native American Rights Fund in *Rosebud* directly supports the position of the County today.

b. In *Rosebud Sioux Tribe*, all the Justices agreed with the Native American Rights Fund that cessions disestablished reservations. The majority and the dissent of Justice Marshall both reaffirmed *DeCoteau*. Justice Marshall clearly summarizes the arguments that cessions like the Yankton cession disestablish reservations. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 616-632 (1977) (Marshall, J., dissenting). And Justice Marshall specifically recognized that *DeCoteau* was the pathmarking cession disestablishment case.

> [T]he Court has found disestablishment when Congress ratified a treaty by which Indians agreed to sell all interest in part or all of a reservation, *DeCoteau v. District County Court, supra*

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 617 (1977) (Marshall, J., dissenting).

> In *DeCoteau*, the Court clearly distinguished the two situations, observing:
>
> > '[A purchase-and-sale Act] is not a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented. [It] does not merely open lands to settlement; it also appropriates and vests in the tribe a sum certain . . . in payment for the express cession and

> relinquishment of "all" of the tribe's "claim, right, title, and interest," in the unallotted lands. . . .'

Id. at 617-618.

> In *DeCoteau* we stated that this language, which contained in an agreement approved by the Indians and ratified by Congress, is "precisely suited," 420 U.S., at 445, to terminating a reservation. . . . Whereas in *DeCoteau* the key phrase expressed the Indians' understanding of what they were surrendering and the Government's understanding of what it was acquiring.

Id. at 619.

> Congress did not intend to remove the opened *areas* from the Reservation.

Id. at 621 (emphasis added).

> Significantly, the 1901 Agreement which, if ratified, would have partially terminated the Reservation

Id. at 621 n.6.

The key role that *DeCoteau* played in the *Rosebud Sioux Tribe* decision and the fact that the Native American Rights Fund argued *DeCoteau* cession disestablishment in *Rosebud Sioux Tribe* makes the omission of *Rosebud Sioux Tribe* in the Tribe's Cross-Petition, co-authored by the Native American Rights Fund, even more remarkable.

c. Moreover, the brief of the Native American Rights Fund in *Rosebud Sioux Tribe* and the dissent in *Rosebud Sioux Tribe* reference other materials that further support and confirm cession and disestablishment in the context of the cessions in *DeCoteau* and *Yankton Sioux Tribe*. The material conflicts with the holdings of the court of appeals and the arguments in the Tribe's cross petition. For example, in *Rosebud Sioux Tribe*, Justice Marshall cites the National Indian Law Library's compilation of Allotment/Cession Statutes compiled by the Native American Rights Fund in 1973, two years before *DeCoteau* was decided. National Indian Law Library, Allotment/Cession Statutes, Doc. No. 002279. Although the Marshall dissent cites the document for reasons unrelated to the issue here, the compilation clearly puts the *DeCoteau* cession and the *Yankton Sioux Tribe* cession in the same category, both recognized as reservation disestablishment statutes.

The County has appended excerpts from the National Indian Law Library, Allotment/Cession Statutes, Doc. No. 002279. Respondent County's App. at 37-38. As that text explains, the tables note "'outright cession' statutes have been . . . more prone in the past to find disestablishment." *Id.* at 38. Significantly, the "more liberal" case noted in the text that had just recently reached a contrary conclusion regarding cession and disestablishment was squarely reversed by this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). *See United States ex rel. Feather v. Erickson*, 489 F.2d 99 (8th Cir. 1973).

DeCoteau unequivocally resolved the issue of cession and disestablishment.

d. Other briefs filed by other tribes and tribal organizations in *Rosebud Sioux Tribe* contain more materials that also support and confirm this type of cession and disestablishment. The Brief Amici Curiae of Association on American Indian Affairs, Inc , et al. emphasizes the traditional position of the Department of Interior:

> Specifically, in a formal opinion published in 1934, the Solicitor of the Department of the Interior held as follows:
>
> > During the early years of our dealing with the Indians, the custom was to have individual or combined nations, tribes, or bands relinquish or cede to the United States large areas claimed by them for which there was usually a cash or other consideration, and also the setting apart or reserving of certain lands within such ceded areas or from lands belonging to the United States and located elsewhere. . . . *In this way the Indians lost all identity with the ceded areas and their rights and interests therein were recognized as having been completely extinguished.*
> >
> > In years following, for reasons varying on the different reservations, portions of these diminished or newly established reservations were also ceded to the

> United States. . . . *In this way the exterior boundaries of a reservation were further reduced.* . . .

Brief Amici Curiae of Association on American Indian Affairs, Inc., et al., *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562), at 29-30.

The Solicitor of the Department of Interior goes on in this decision to conclude that land obtained by "outright cessions" would not be considered for restoration to tribal ownership. Interior Department Opinion, 54 I.D. 559, 560-561 (1934). However, lands for which the Indians receive the proceeds of the sale only as the tracts were sold would be included. Significantly, in South Dakota, the Lake Traverse Reservation, ceded and at issue in *DeCoteau*, and the Yankton Reservation, ceded and at issue in *Yankton Sioux Tribe*, were both excluded from restoration to tribal ownership.[1]

3. Another significant omission in the Conditional Cross-Petition of the Yankton Sioux Tribe centers around the failure of the Cross-Petition to discuss or even cite the conflicting opinion of the South Dakota Supreme Court in *Bruguier v. Class*,

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[1] Similarly, in *Rosebud Sioux Tribe*, the United States also repeatedly acknowledged that cessions disestablish reservations The conflicting arguments of the United States are tracked in the Brief of Charles Mix County, South Dakota, Amicus Curiae, in Support of Petitioner, State of South Dakota, *South Dakota v Yankton Sioux Tribe*, 522 U S 329 (1998) (No 96-1581), reproduced in County App II, 460-502 (481-482).

599 N.W.2d 364 (S.D. 1999). Importantly, the Yankton Sioux Tribe does not claim that it lacked an opportunity to participate in *Bruguier*, it simply chose not to participate.

The County discusses *Bruguier* at length in the County's Petition for Certiorari in No. 10-932. Petition for Writ of Certiorari, *Hein, State's Attorney for Charles Mix County, et al. v. Yankton Sioux Tribe, et al.* (No. 10-932), at 16-33. The County appended the Memorandum Opinion and Order of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, in *Bruguier v. Class*, June 30, 1998, at County App. I, 396-406, the Findings of Fact and Conclusions of Law of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, in *Bruguier v. Class*, August 14, 1998, at County App. I, 407-430, and the Opinion of the Supreme Court of the State of South Dakota in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), County App. I, 164-198.

In addition, the *amici* Cities also discuss *Bruguier* at length. Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae*, in Support of Petitions for Writ of Certiorari, *Dennis Daugaard, Governor of South Dakota, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932), at 9-20. With reference to the memorandum opinion and order of the circuit court, the *amici* Cities quote the unequivocal manner in which the circuit court posed the question:

When *Bruguier* was presented in the circuit court, the circuit court framed the issue in that comprehensive manner:

> In order to determine whether this crime occurred on Indian country as defined in 18 USC § 1151, the Court must make *two* separate inquiries. First, the Court must determine whether land within the 1858 reservation area retains reservation status under *18 USC § 1151(a)*. If the Court finds this land is a reservation under 18 USC § 1151(a), there was no jurisdiction to try Bruguier in the South Dakota Courts. If, however, the Court finds this land was not a reservation under 18 USC § 1151(a), it must then determine whether the allotments in this case are Indian country under *18 USC § 1151(c)*.

Bruguier v. Class, County App. I, 398 (emphasis added). Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae*, in Support of Petitions for Writ of Certiorari, *Dennis Daugaard, Governor of South Dakota, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932), at 12.

The County also thinks that a careful consideration of the manner in which the circuit court decided *Bruguier* clearly undermines the "no conflict" position. Petition for Writ of Certiorari, *Hein, et al. v. Yankton Sioux Tribe, et al.* (No. 10-932), at 16-33. The County expected the United States and the Yankton

Sioux Tribe to disagree. And as of May 9, 2011, they have disagreed. For that reason, the County also specially emphasizes the way in which the circuit court carefully structured the *Bruguier* decision.

With respect to the first issue, the circuit court also specifically noted that:

> The Court's *first* inquiry is whether this land is within the limits of an Indian reservation under 18 USC § 1151(a). The State argues in *this* case that the Yankton Sioux Reservation was *disestablished* based upon both *DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 95 S Ct. 1082, 43 L.Ed 2d 300 (1975) and *Yankton Sioux Tribe*.

Memorandum Opinion and Order of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, in *Bruguier v Class*, June 30, 1998, County App. I, at 399 (emphasis added).

Clearly, the circuit court was correct in concluding that two separate inquiries were *necessary* to decide the case.

The County also submitted a detailed discussion of the circuit court decision in *Bruguier* starting with the memorandum opinion and order. Petition for Writ of Certiorari, *Hein, et al. v. Yankton Sioux Tribe, et al.* (No. 10-932), at 28-29. Significantly, the memorandum opinion and order was not fact-bound in any respect. Rather, the circuit court relied upon the

decision of this Court in *Yankton Sioux Tribe* and other venerable decisions. *Id.* at 29. The County also addressed the definitive findings of fact and conclusions of law of the circuit court. *Id.* at 28-30. Again, the findings of fact and conclusions of law demonstrate that there is nothing in the circuit court opinion that can fairly be said to be fact bound.

The opinion of the State Supreme Court in *Bruguier* approaches the question in the same manner as the circuit court. As a result, the *Bruguier* opinion demonstrates the genuine conflict that exists in this case. The argument of the *Yankton Sioux Tribe* in the latest submission dated May 9, 2011, does not undermine this genuine conflict in any significant respect. Brief in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932). *See also* County Petition at 8 pointing out that the United States and the Tribe both recognized that *Bruguier* did conclude that the Reservation was "wholly disestablished," as they told this Court at the time in Applications for an Extension of Time, 5 n.1, *United States v. Yankton Sioux Tribe*; 4 n.1, *Yankton Sioux Tribe v. Gaffey*; *South Dakota v. Yankton Sioux Tribe*, *Yankton Sioux Tribe v. Gaffey* (Nos. 99-1490 and 99-1683).

4. The status of the 1858 reservation boundary.

a. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135, 1148 (D.S.D. 1998). On a closely related point, the Yankton Sioux Tribe also fails to directly address the status of the 1858 reservation boundary. In the

initial remand, the United States and the Tribe teamed up in convincing the district court to again erroneously recognize the 1858 reservation boundary.[2] In this instance, the district court (the same court that originally resurrected the 1858 reservation boundary in the first instance in *Yankton Sioux Tribe*) again recognized the 1858 reservation boundary to somehow encompass a reservation that would consist of all lands except for those expressly ceded in the cession agreement construed in *Yankton Sioux Tribe*. Such a reservation would have, of course, included the 230,000 acres of former allotments now held fee by non-Indians with the 1858 reservation boundaries.

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[2] After *Yankton Sioux Tribe*, the court of appeals remanded this case to the district court. The district court consolidated the original action, *Yankton Sioux Tribe v. Southern Missouri Waste Management District* (No. 94-4217), with a new action, *Yankton Sioux Tribe v. Gaffey* (No. 98-4042). In the new action, the Yankton Sioux Tribe sought declaratory and injunctive relief precluding the State of South Dakota and Charles Mix County from exercising criminal jurisdiction over tribal members. In the new action, the tribe continued to rely on the 1858 boundaries contrary to the express language in this Court's opinion in *Yankton Sioux Tribe*.

> WHEREFORE, Plaintiff prays as follows: For judgment in favor of Plaintiff declaring that all lands *within the original boundary* of the Yankton Sioux Reservation not 'ceded' by the 1894 statute between the U.S. government and the Yankton Sioux Tribe comprise the Yankton Sioux Reservation.

Complaint for Injunctive Relief and for Declaratory Judgment, *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D. 1998) (No. 98-4042), at 7 (emphasis added).

The district court's resurrection of the 1858 reservation boundaries was in spite of the solid arguments presented by the State and the County. In those arguments, the State and the County pointed out that this Court in *Yankton Sioux Tribe* repeatedly acknowledged and relied on the fact that the 1858 reservation boundary had been disestablished. *Yankton Sioux Tribe*, 522 U.S. at 333, 343, 345-347, 353, set forth *infra* at 18-19.

The County discusses the disestablishment of the 1858 reservation boundaries in detail because original reservation boundaries are the cornerstone of any reservation disestablishment argument, as this Court recognized in *DeCoteau*, *Rosebud Sioux Tribe*, and *Yankton Sioux Tribe*.

b. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1013, 1020-1021 (8th Cir. 1999). On appeal to the court of appeals, the County squarely addressed the mistaken holding of the district court with reference to yet another resurrection of the 1858 reservation boundary. Brief for Matt Gaffey, et al., *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000) (Nos. 98-3893/3894/3896/3900SDSF), at 9-12. The County began by pointing out that this Court clearly resolved the status of these boundaries in *Yankton Sioux Tribe*, contrary to the argument presented to the district court by the United States and the Yankton Sioux Tribe and contrary to the conclusion of the district court.

With respect to reservation boundaries, the analysis of this Court in *DeCoteau* and *Rosebud Sioux Tribe* informed the Court in *Yankton Sioux Tribe*. Congress intended the Yankton cession to disestablish those boundaries in the same manner as *all* previous cessions disestablished original reservation boundaries. In *Yankton Sioux Tribe*, this Court recognized this basic principle. As a result, this Court held that the 1858 boundaries were not "maintained." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333, 343, 345-347, 353 (1998), set forth *infra* at 13-14.

The Yankton Sioux Tribe and the United States faced an almost insurmountable obstacle in the court of appeals: namely, how to overcome the lack of historical documentation to support their position and that of the district court that the "Yankton Sioux Reservation" could *somehow* still exist so as to include *all* lands originally allotted there (over 90% of which are now in fee status and are owned by non-Indians) (232,000 acres of noncontiguous fee lands of the total allotted 263,000 acres of noncontiguous land). *See Yankton Sioux Tribe*, 522 U.S. at 338-339.

In the court of appeals, the Yankton Sioux Tribe and the United States maintained that the conclusion of the federal district court recognizing the continuing existence of the 1858 reservation boundaries was sound. According to the federal district court, Congress intended to *maintain* the 1858 reservation boundaries intact, and at the same time, Congress also intended to somehow excise or remove only the ceded lands from the 1858 Reservation. *Yankton*

Sioux Tribe, 14 F.Supp.2d at 1143. In other circumstances, this approach could have provided the district court with some cover regarding the *lack* of historical documentation to support new reservation boundaries that, alternatively, could have encompassed all lands originally allotted. But, the 1858 boundary conclusion of the federal district court was fundamentally flawed in every significant respect and already rejected by this Court in *Yankton Sioux Tribe*.

The 1858 boundary conclusion of the district court ignored the holding of this Court in *Yankton Sioux Tribe*. With specific respect to the 1858 reservation boundaries, express language in *Yankton Sioux Tribe* clearly refutes the notion that this Court recognized the viability of the 1858 boundaries subsequent to the passage of the 1894 Yankton Act:

> This case presents the question *whether*, in an 1894 statute that ratified an agreement for the sale of surplus tribal lands, Congress *diminished the boundaries* of the Yankton Sioux Reservation . . .
>
> *States* acquired primary jurisdiction over unallotted opened lands where "the applicable surplus land Act freed that land of its reservation status and *thereby diminished the reservation boundaries.*" . . . *In contrast,* if a surplus land Act "simply offered non-Indians the opportunity to purchase land *within* established reservation boundaries," *id.*, at 470, 104 S.Ct., at 1166, then the *entire opened area* remained *Indian country*. Our touchstone to determine whether a given

statute *diminished or retained reservation boundaries* is congressional purpose.

The 1894 Act is also readily *distinguishable* from surplus land Acts that the Court has interpreted as *maintaining reservation boundaries. . . . In contrast,* the 1894 Act at issue here . . .

The Yankton Tribe and the United States, appearing as *amicus* for the Tribe, rest their argument against diminishment primarily on the saving clause in Article XVIII of the 1894 Act. The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the *existing reservation boundaries were maintained.* The United States urges a similarly "holistic" construction of the agreement . . . Moreover, the Government's contention that the Tribe intended to cede some property but maintain the entire reservation as its territory contradicts the common understanding of the time: that tribal ownership was a critical component of reservation status. . . .

[W]e *conclude* that the saving clause pertains to the *continuance* of annuities, not the 1858 *borders.*

[T]he record of the negotiations between the Commissioners and the Yankton Tribe contains no *discussion* of the preservation of the 1858 *boundaries* . . .

[T]he Commissioners' report of the negotiations signaled their understanding that the

> cession of the surplus lands *dissolved* tribal governance of the 1858 reservation.

Yankton Sioux Tribe, 522 U.S. at 333, 343, 345-347, 353 (emphasis added).

All else aside, this Court has made clear that the 1858 "reservation boundaries" were not "retained" or "maintained" – "we *conclude* . . . *continuance* of annuities, not the 1858 *borders*." *Id.* at 347 (emphasis added). At the very least, this Court decided that question. This Court stated that the "case" presented the question of whether "Congress *diminished the boundaries*" of the Yankton Sioux Reservation and this Court decided that question. *Id.* at 333 (emphasis added). The unresolved issue, as this Court also clearly stated, was "whether Congress disestablished the reservation altogether." *Id.* at 358. The district court ignored all of this.

In the end, the court of appeals rejected the argument of the Yankton Sioux Tribe and the United States, and rejected the 1858 boundaries.

> [W]e reverse the conclusion that the original exterior boundaries of the reservation continue to have effect and that all nonceded lands remain part of the reservation. . . .
>
> The *Yankton* Court did make a number of explicit references to the status of the reservation boundaries. The Court found the 1894 Act distinguishable from those acts which it "has interpreted as maintaining reservation boundaries." *Yankton*, 118 S.Ct. at 799. The

> question before it was described as whether the 1894 Act "diminished the boundaries" of the reservation. *Id.* at 793. The Court distinguished situations in which states acquired primary jurisdiction over opened lands and "thereby diminished the reservation boundaries" from those in which the entire opened area remained Indian country even though non Indians were able to purchase land. *Id.* at 797-98 (citations omitted). In the Commission reports it found evidence that the 1894 Act involved alteration of "the reservation's character" and "a reconception of the reservation." *Id.* at 802. Some of the language was "reminiscent" of that used for the diminished Unitah reservation. *Id.* ("Congress would 'pull up the nails' holding down the outside boundary" of the reservation) (citation omitted). The Court went on to hold that the savings clause of Article XVIII "pertains to the continuance of annuities, *not the 1858 borders*." *Id.* at 800 (emphasis added). These references indicated the Court's understanding that the 1858 reservation boundaries did not remain intact following passage of the 1894 Act. . . .
>
> [W]e conclude that the original exterior boundaries of the Yankton Sioux Reservation do not serve to separate Indian country from areas under primary State jurisdiction.

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1013, 1020-1021 (8th Cir. 1999).

Incredibly, the Yankton Sioux Tribe mentions none of this in the submissions to this Court including the May 9, 2011, Brief in Opposition. Brief in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932). Even more incredibly, the submissions of the United States are similarly silent with reference to the manner in which this Court decided the issue regarding the 1858 reservation boundary, the manner in which the district court, the United States and the Yankton Sioux Tribe subsequently ignored that decision, and the manner in which the court of appeals thought it put the issue to rest. Brief for the United States, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931, 10-932 and 10-1058). Brief for the Federal Respondents, *Yankton Sioux Tribe, et al v. United States Army Corps of Engineers, et al.* (No. 10-1059).

c. In spite of the unanimous rejection of the 1858 boundary in this matter by the court of appeals, for the next decade the Yankton Sioux Tribe and the United States continued to insist that the 1858 reservation boundary was intact or could be used in some fashion to support some argument related to the existence of an 18 USC §1151(a) reservation. Even now, in the Conditional Cross-Petition the Tribe continues to avoid directly addressing the 1858 boundary issue, conceding only that this Court rejected the argument that would leave the "1858 *reservation* intact." Conditional Cross-Petition for a Writ of Certiorari, *Yankton Sioux Tribe v. Daugaard, et al.*

(No. 10-1058), at 11 (emphasis added). In other words, the Tribe concedes only that the ceded lands were somehow removed from the reservation, without actually acknowledging that this Court held that the 1858 boundaries were disestablished, or that the court of appeals expressly recognized and reaffirmed that holding.

As a result, any argument that the Tribe or the United States advances to support an 1151(a) Indian reservation with new reservation boundaries must be viewed in light of the fact that the 1858 reservation boundary was disestablished by Congress by the passage of the 1894 Act.

Moreover, the acknowledgement of the lower courts that "the Commission's reports do not describe any reservation boundaries" further undermines the claims of the Tribe and the United States that a thirty-seven thousand (37,000) acre 18 USC §1151(a) noncontiguous reservation exists, and makes even less likely that a two hundred sixty seven thousand (267,000) acre noncontiguous reservation exists, as the Tribe claims. *Yankton Sioux Tribe*, 188 F.3d at 1026. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135, 1148 (D.S.D. 1998).

5. In its May 9, 2011, Brief in Opposition of the Yankton Sioux Tribe, the Yankton Sioux Tribe focuses on the rehearing Order and the related footnote in the court of appeals initial decision that affected thousands of acres of non-Indian fee lands (former allotments). The State, County and Southern

Missouri Petitioners and additional *amici* supporters convinced the court of appeals to amend that opinion and delete the offending footnote. The Order of the court of appeals filed at the same time explains, from the court's perspective, the "facts" leading to the deletion. Brief in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932), at 28-30. The County disputes those facts.

The Yankton Sioux Tribe asserts at length that the County's treatment of the issue demonstrates that the County recognizes that this case lacks practical importance. Brief in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932), at 28-30. The Yankton Sioux Tribe is certainly mistaken. And, in fact, the opposite is true. This issue demonstrates that this case has a high degree of practical importance. This issue demonstrates that the decisions of the district court and the court of appeals, at the very least, lack principled support. For this reason, the County will address the amended footnote and related inaccuracies in detail. At the same time, this examination also reaffirms the legitimacy of the County's submission in this case.

From the very beginning, the remands in this case were expressly limited in scope to the *trust* lands by the court of appeals. At the time, even the United States acknowledged that that was the case.

> Because the court of appeals could not determine from the record or from counsel at oral argument what other trust lands remain

> within the original boundaries of the Yankton Sioux Reservation, the court remanded the matter to the district court "to make any necessary findings relative to the status of Indian lands which are held in *trust*."

Brief for the United States in Opposition, *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000) (Nos. 99-1490 and 99-1683), at 21 (emphasis added).

Nevertheless, the district court and the court of appeals subsequently ignored the scope of the remand and considered arguments that would place fee land in reservation status.

In an attempt to discredit the County, the court of appeals conveniently neglects to mention that the district court did not initially pay any attention to the scope of the remand with reference to trust lands. When the district court ignored the scope of the remand and indicated that *fee* land could be at issue, the State and County pointed out that the issue was straightforward. The focus of the remand should have been on the status of the trust lands. In fact, the court of appeals had previously explicitly stated that the scope of the remand was strictly limited in this respect:

> On the record before the court, however, we cannot define the precise limits of the reservation which remains.

> The current amount of Indian *trust land* on the Yankton Sioux Reservation is unclear from the record. . . .
>
> References in the briefs in these cases and in judicial opinions are not always clear about what is meant by *trust land*. . . .
>
> [W]e leave it to the district court on *remand* to make any necessary findings relative to the status of Indian lands which are held in *trust*.

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999) (emphasis added).

Moreover, the County pointed out that even the United States, who routinely supported *all* tribal claims throughout the years in this litigation (13 years), did *not* support the expansive claim of the Yankton Sioux Tribe regarding these fee lands. The tribal claim ignored the mandate and this trust land limitation in putting fee lands at issue. The United States recognized, as did the State and the County, that the focus of the remand was trust land. The status of fee lands, owned primarily by non-Indians, was not within the scope of the remand.

In a primary argument, the United States expressly stated that the remand issue before the district court should be limited to the Indian country status of trust lands. According to the United States:

> [T]he Eighth Circuit remanded this matter to the District Court *only* 'to make any

> necessary findings relative to the status of Indian lands which are held in *trust*'

Brief of United States, *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040 (D.S D. 2007) (No. 98-4042), at 5-6 (emphasis added).[3]

The district court *disagreed* and adopted the Tribe's position that the argument of the Tribe addressing fee land would be considered on the merits in the remand

As such, the recognition by the United States of the limitations on the scope of the mandate that supported the position of the State and County, further supported a difference of opinion on an issue of law, that clearly supported a permissive appeal from the district court. When the district court refused to reconsider or allow a permissive appeal regarding the inclusion of fee land within the scope of the remand, the State and the County filed petitions for writ of mandamus.

The County's petition for writ of mandamus is reproduced in Respondent County's Appendix. Petition for Writ of Mandamus (County), *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp 2d 1040 (D.S.D. 2007) (No. 07-1779), Respondent County's App. at 1-6.

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[3] The United States did make a number of other arguments regarding the scope of the mandate. Whether viewed individually or as a group, Petitioners found these other arguments of the United States unclear, internally inconsistent, confusing, and without substance.

The State's petition for writ of mandamus is also reproduced in Respondent County's Appendix. Petition for Writ of Mandamus (State), *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp 2d 1040 (D S.D. 2007) (No. 07-1779), Respondent County's App. at 7-36. Together, the petitions for the writs recount the details in the scope of the mandate controversy. *Id.*

The petitions were denied and the district court, after hundreds of hours of additional research, briefing and argument by the parties on the fee land question, ultimately rejected the Tribe's arguments to include fee land in reservation status. This rejection, however, was based on the merits, rather than on the scope of the remand. On appeal, the court of appeals summarily affirmed the district court's rejection on the merits regarding fee lands.

The next time fee lands were implicated in this remand was a complete surprise. Astoundingly, the panel, on its own notion, incorrectly added another 7,000 acres of noncontiguous *fee land* to this unique reservation because of a misreading of the generic Indian country statute, 18 USC §1151, that never mentioned the Yankton reservation and was passed in 1948, more than a half century after the Yankton Act. *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009), County App. I, 104.

In the process, no one was even given an opportunity to brief the 18 USC §1151(a) reservation status of this fee land: not the State, not the County, not the United States, not the Yankton Sioux Tribe, and most

importantly, not the landowners, with lives and fee property impacted ("within the limits" of a reservation), without *any* notice. Moreover, because the district court specifically recognized that the panel had previously held that allotted lands which had been transferred to non-Indian fee status were *not* within the limits of Yankton Sioux Reservation, the action of the panel was especially perplexing. *Yankton Sioux Tribe v. Podhradsky,* 529 F.Supp.2d 1040, 1052 (D.S.D. 2007). *See infra* at 30-32 (discussion regarding conflicts within the remands in this case).

To date, this fee land is known to include the Wagner Community School District, the Wagner Early Childhood, Inc., the Wagner Fire Protection District, and numerous non-Indian residential homes and farms. *See Amicus Curiae* Brief of Charles Mix Electric Association, Inc. and Rosebud Electric Cooperative, Inc. in Support of Petitions for Writ of Certiorari; Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae,* in Support of Petitions for Writ of Certiorari; *Amicus Curiae* Brief for Colin Soukup, Representing the Frank Soukup Family Limited Partnership, and Dan Cimpl in Support of Petitions for Writ of Certiorari; Brief of Randall Community Water District, *Amicus Curiae,* in Support of Petitions for Writ of Certiorari; and *Amicus Curiae* Brief of Wagner Community School District No. 11-4 in Support of Petitions for Writ of Certiorari, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932). The State, County and Southern Missouri filed extensive

petitions for rehearing. The amended opinion on rehearing purportedly removed this fee land from the panel opinion.

The court of appeals intemperately chastised the County for overreacting and for not understanding that only trust land was really at issue in this case, ignoring the efforts of the County for reconsideration to limit the issue to trust land, for a permissive appeal to limit the issue to trust land and for a writ of mandamus to limit the issue to trust land, which the court of appeals finally conceded was correct when it removed the footnote that put fee lands at issue, taking fifteen pages to do so. Order on Petitions for Rehearing of the United States Court of Appeals for the Eighth Circuit, *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), County App. I, 52-70.

In this light, the court of appeals had no basis whatsoever to claim that the County raised a virtual smokescreen by focusing on the footnote that squarely implicated these fee lands before it was deleted on rehearing. *Id.* at County App. I, 54. The explanation of the court of appeals in the Order with reference to the intentional action of the court in drafting the judgment completely lacks credibility. *Id* at County App. I, 55. The Order referencing "textual asides touching on matters not litigated or decided, but which have possibly been misunderstood," is even less credible. *Id.* at County App. I, 56. And the court's final reference to "other extraneous language . . . in the nature of a hypothetical reflection stimulated by

study of shifting federal Indian policy" does nothing to rehabilitate these sorry excuses for alarming the State, the County, Southern Missouri Recycling and Waste Management District and the affected landowners, almost all of whom were non-Indians. *Id.* at County App I, 60.

As this example attests, submissions that claim any holding in this case is somehow tied to specific evidence of congressional intent directed to the Yankton Reservation are truly wholly illusory. The conclusion regarding resurrecting 18 USC §1151(a) reservation boundaries around isolated trust allotments or other isolated trust lands is more than historical legerdemain. The conclusion of the panel regarding the post 1948 allotments that are now fee lands was worse than that. And to have arrived at these results in the face of *Yankton Sioux Tribe* is especially troublesome.

These facts add to the other compelling reasons in the Petitions to review this case. The court of appeals has so far departed from the accepted and usual course of judicial proceedings that an exercise of this Court's supervisory power is especially appropriate.

6. There is one redeeming point in this entire episode involving the two failed attempts to improperly include fee lands within the scope of this remand and within the limits of a Yankton Reservation. The fee land issue serves to highlight the internal conflicts and internal inconsistencies in the *holdings* of

the several remands that still persist. Namely, no effort has been made in this case to address the inexplicable fact that for some unstated reason allotments held in fee for decades prior to the decisions in this case are and will remain in *non-reservation status*, while allotments still in trust on the date of the decisions in this case, are now and will remain for some unstated reason, within the limits of a reservation boundary under 18 USC §1151(a). In other words, how do reservation boundaries suddenly appear to encompass these thirty thousand acres of noncontiguous trust allotments on the date of the decisions, when no reservation boundaries have encompassed the allotted fee lands at any time since the date of the Yankton Act, up to and including today?

The County would submit that the United States has recognized the problem that this conflict poses with respect to the legitimacy of the opinions below. That was the reason that the United States previously supported the claim of the Yankton Sioux Tribe that the Yankton Reservation should somehow encompass all of these fee lands and that the court of appeals decision to the contrary was mistaken. Significantly, the United States did not retreat from that position *until* their submission of May 9, 2011. Brief for the Federal Respondents, *Yankton Sioux Tribe, et al. v. United States Army Corps of Engineers, et al.* (No. 10-1059).

Surely, the United States must recognize that if one allotment is within the Yankton Reservation, all allotments must be similarly situated, whether in fee or trust. Of course, the reverse of this argument would also be true. If one allotment is not within the Yankton Reservation, then no allotments should be within the Yankton Reservation, whether in fee or trust As a result, it is self-evident that the conflicts effectively undermine the decision of the court of appeals with respect to at least thirty two thousand (32,000) of the thirty-seven thousand (37,000) acre Yankton Reservation or otherwise another two hundred thirty thousand (230,000) acres of non-Indian fee land must be included within the Yankton Reservation (and the United States is clearly opposed to that alternative).

Moreover, the reluctance of the United States to support the Tribe's argument at this time could be triggered by the fact that the United States would then have to support the Tribe's claim with respect to the continuing existence of the 1858 reservation boundaries. That would seem to be an especially difficult claim to maintain in this Court in light of the decision of *Yankton Sioux Tribe*, especially for a former Solicitor General of the United States.

Given the generic nature of the conclusion and its applicability throughout similar areas across South Dakota and the Country, this internal conflict and internal inconsistency supports the practical importance of the case presented in the Petitions for Writ of Certiorari. It is noteworthy that the Yankton

Sioux Tribe takes comfort in the mischaracterization of the County's concern regarding fee lands and the scope of the trust land mandate in the order of the court of appeals. This is especially so in light of the fact that in the district court the arguments of the Yankton Sioux Tribe ignored the scope of the mandate regarding trust land and implicated other fee land in the same manner as the court of appeals. It is also noteworthy that the court of appeals found it necessary, in the final analysis, to issue a fifteen page Order to explain the deletion of the offending footnote, and that Order was not filed until after a delay of over twenty-five weeks.

CONCLUSION

When the issue regarding the status of the Yankton Sioux Reservation was before this Court in *Yankton Sioux Tribe*, a unanimous Court provided the federal district court and the court of appeals with an opportunity. It was an opportunity to address a legitimate issue after having previously adopted an absurd result. The legitimate issue was whether the Yankton Sioux Reservation had been disestablished. The decisions of the district court and the court of appeals since that time do not reflect an appreciation of that opportunity or proper respect for the principles reflected in the decisions of this Court. The Petitions for Writ of Certiorari in Nos. 10-929, 10-931,

and 10-932 should be granted and the Conditional Cross-Petition in this case should also be granted.

Respectfully submitted,

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No. 10-1058

In the
Supreme Court of the United States

YANKTON SIOUX TRIBE, AND ITS INDIVIDUAL MEMBERS,
Cross-Petitioners,

v.

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA; MARTY J. JACKLEY, ATTORNEY GENERAL OF SOUTH DAKOTA, SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT, PAM HEIN, STATE'S ATTORNEY OF CHARLES MIX COUNTY, ET AL.,
Cross-Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT IN RESPONSE TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

In order to conserve scarce resources and not unduly burden this Court with repetitious arguments, Southern Missouri Recycling and Waste Management District supports the argument in the Response of Governor and Attorney General to Conditional Cross-Petition for a Writ of Certiorari and the Brief of Respondent Charles Mix County in Response to the Conditional Cross-Petition for Writ of Certiorari, *Yankton Sioux Tribe, et al. v. Dennis Daugaard, Governor of South Dakota, et al.* (No. 10-1058). In addition, Southern Missouri Recycling and Waste Management District is aware that *amici curiae* in support of the Petitions of the State, County and Southern Missouri Recycling and Waste Management District in Nos. 10-929, 10-931 and 10-932 share similar concerns. *See* interests of *amici curiae* set forth in the *Amicus Curiae* Brief of Charles Mix Electric Association, Inc. and Rosebud Electric Cooperative, Inc. in Support of Petitions for Writ of Certiorari; Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae*, in Support of Petitions for Writ of Certiorari; *Amicus Curiae* Brief for Colin Soukup, Representing the Frank Soukup Family Limited Partnership, and Dan Cimpl in Support of Petitions for Writ of Certiorari; Brief of Randall Community Water District, *Amicus Curiae*, in Support of Petitions for Writ of Certiorari; and *Amicus Curiae* Brief of Wagner Community School District No. 11-4 in Support of Petitions for Writ of Certiorari, *Daugaard, et al. v. Yankton Sioux Tribe, et al* (Nos. 10-929, 10-931 and 10-932).

For these reasons, Southern Missouri Recycling and Waste Management District relies on the arguments that Southern Missouri Recycling and Waste Management District previously submitted in No. 10-931.

CONCLUSION

Southern Missouri Recycling and Waste Management District also agrees with the conclusions in the Response of Governor and Attorney General to Conditional Cross-Petition for a Writ of Certiorari and the Brief of Respondent Charles Mix County in Response to the Conditional Cross-Petition for Writ of Certiorari, *Yankton Sioux Tribe, et al. v. Dennis Daugaard, Governor of South Dakota, et al.* (No. 10-1058) that the Petitions for Writ of Certiorari in Nos. 10-929, 10-931, and 10-932 should be granted and the Conditional Cross-Petition in this case should also be granted.

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No. 10-1058

In the
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YANKTON SIOUX TRIBE, AND ITS INDIVIDUAL MEMBERS,
Cross-Petitioners

v.

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, MARTY J. JACKLEY, ATTORNEY GENERAL OF SOUTH DAKOTA, SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT, PAM HEIN, STATE'S ATTORNEY OF CHARLES MIX COUNTY, ET AL.,
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REPLY BRIEF OF CROSS-PETITIONERS

1. For the reasons already explained in the Tribe's brief in opposition and conditional cross-petition, this Court should deny all of the petitions in this case. The questions presented are fact-bound, and do not implicate any clear splits in authority. And while the reservation's very existence has crucial cultural significance to the Tribe, questions concerning the existence or extent of this particular reservation have very limited practical significance to all others. All lands currently recognized as being within the reservation are Indian country for additional reasons beyond their reservation status — and are thus subject to federal and tribal jurisdiction no matter how this Court might rule on the questions presented. Moreover, all affected parties have reached practical accommodations to the realities on the ground over the past decade, demonstrating that further review is not needed and would, instead, serve only to destabilize a now-stable situation. YST Opp. 23-32; U.S. Opp. 24-30.

Those conclusions are only confirmed by petitioners' continued focus on lands that, they admit, the court of appeals did *not* consider. *E.g.*, County Resp. 24-35. While petitioners and their *amici* are not shy about expressing frustrations with the Tribe, the United States, and the decision below, they still have not been able to identify any significant practical consequence from the court of appeals' actual decision. And apart from the cultural importance of the reservation to the Tribe, there is none. YST Opp. 23; U.S. Opp. 24.

All that said, if this Court were to grant the petitions in Nos. 10-929, 10-931, and 10-932, it clearly should *also* grant the conditional cross-petition. The petitioners in all three of those actions concede that granting the conditional cross-petition would be the appropriate course, in order to ensure that this Court is not procedurally constrained from considering the "full range of arguments" about congressional intent. State Resp. 1; *see also* County Resp. 1; Dist. Resp. 1. And if this Court is going to grant plenary review to consider the status of this one, particular reservation, it certainly should consider the status of the entire reservation and have available to it the full range of remedial options.

2. As explained in the conditional cross-petition, the 1894 Congress must have intended one of three things: (1) to diminish the reservation to the extent of the lands ceded to the United States in 1894 (the Tribe's view); (2) to diminish the reservation to that extent *and* further to the extent that non-ceded lands later passed into non-Indian hands (the court of appeals' view); or (3) to disestablish the reservation completely (petitioners' view). If this Court were to grant certiorari in No. 10-929, 10-931, or 10-932, the latter two theories would be squarely before it. Granting the conditional cross-petition would merely avoid any procedural obstacle to reaching the other possible conclusion about congressional intent. YST Cross-Pet. 15.

Moreover, the questions presented in the petitions and the conditional cross-petition all turn on analysis of the same indicia of congressional

intent. YST Cross-Pet. 12-15. The Tribe has shown that express provisions in the 1894 Act, express statements in the negotiation records, and the legislative history support diminishment only to the extent of the ceded lands, and no further. *Id.* The Eighth Circuit likewise relied on the "text of the 1894 Act, read in its full historical context" in adopting its middle ground. Pet. App. 243. And while petitioners generally ignore the historical context of the 1894 Act, they too rely heavily, albeit inaccurately, on the text of the Act. *E.g.*, State Resp. 6.

Indeed, petitioners' responses to the conditional cross-petition aptly illustrate the extensive factual overlap between the petitions and the conditional cross-petition by rehashing the very same merits arguments they advanced in their petitions. *Compare, e.g., id.* at 5-14, *with* State Pet. at 22-30. It would make little sense for this Court to grant the petitions, and consider the parties' arguments about the same evidence of congressional intent, but preclude itself from drawing one of the three possible conclusions about that intent.

Although the United States (unlike the petitioners) recommends denial of the conditional cross-petition, it emphasizes its primary conclusion (with which the Tribe is in full agreement) that the petitions should be denied and gives no valid reason to deny that cross-petition in the event that the Court disagrees with the United States and grants the other petitions. The United States correctly notes that, "[l]ike the disestablishment issue presented by petitioners, the issue the Tribe raises involves only the application of settled law to this

particular case" in a "fact-bound ruling." U.S. Opp. 31. But that is a reason to deny *all* of the petitions, not to deny the fact-bound conditional cross-petition in the event that the Court grants the intimately-related fact-bound principal petitions. *See* YST Opp. 11-15.

The government further observes that the court of appeals' middle-ground decision "essentially preserves the jurisdictional status quo as it has long existed." U.S. Opp. 31. That is yet another excellent reason to deny *all* of the petitions. *See* YST Opp. 31-32. But it is no reason to deny only the conditional cross-petition, in the event the Court decides to reconsider the long-prevailing status quo.

3. Although petitioners acknowledge that this Court should grant the conditional cross-petition if it were to grant one or more of the other petitions, they argue the merits at length. Indeed, petitioners and their *amici* essentially treat the conditional cross-petition and the related hold petition in No. 10-1059 as opportunities to file additional briefs on the merits of their own petitions. *See, e.g.*, Charles Mix County *Amicus* Br., No. 10-1059; S. Mo. Recycling & Waste Management Dist. *Amicus* Br., No. 10-1059. That only confirms the interrelationship of the petitions and thus the need to grant the conditional cross-petition if the Court were to grant the principal petitions. Petitioners' merits discussion also underscores the fact-bound nature of the questions

presented, and thus the reasons to deny all of the petitions.[1]

a. The Tribe already addressed most of the petitioners' merits arguments in its brief in opposition, and will not belabor those points here. In an attempt to make the issues appear less factual, however, petitioners continue to advance arguments that cannot be squared with this Court's precedents. Most notably, petitioners rely heavily on a supposed "presumption of *disestablishment*," County Resp. 5 (emphasis added) — a presumption that simply does not exist. In particular, petitioners fixate on provisions of the 1894 Act in which the Tribe ceded its unallotted lands for a "sum certain," and treat those provisions as somehow controlling over all of the other textual and contextual evidence. *E.g.*, State Resp. 6.

As the Tribe and the United States have already explained, however, this Court has held only that cession of unallotted lands for a sum certain creates a presumption of *diminishment* with respect to *those* lands; it in no way creates a further presumption of total disestablishment. *See* YST Opp. 16-17; U.S.

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[1] While the United States does not expressly address the merits of the conditional cross-petition, its analysis is fully consistent with its longstanding agreement with the Tribe that the "court of appeals erred in holding that the Yankton Sioux Reservation has been progressively diminished as formerly allotted lands have passed into non-Indian hands." U.S. Br. in Opp., Nos. 99-1490 and 99-1683, at 8; *see also* U.S. CA8 Br., *Podhradsky*, at 24-25 n.9 ("*Gaffey* ruling was in error in .. [finding] intent to diminish the Reservation beyond the loss of the ceded unallotted lands").

Opp. 14 n.3. Nor should it; the Tribe did not cede the other reservation lands, or even a majority of those lands, much less do so for a sum certain. Far from "ignor[ing]" the "cession" language, State Resp. 6, the Tribe embraces it; that language delineates the extent of the diminishment (*i.e.*, diminishment only to the extent of the ceded lands).

The County's efforts to portray the presumption of diminishment as being one of disestablishment only underscore its error. For example, the County quotes a 1934 Interior Department opinion at length for the proposition that "Indians lost all identity *with the ceded areas* and their rights and interests *therein* were recognized as having been completely extinguished." County Resp. 10 (emphases in original; others omitted); *see also* Charles Mix County *Amicus* Br., No. 10-1059, at 3 ("ratification of a cession agreement would extinguish the Tribe's claim or title *to the affected area*") (emphasis added). Exactly — cession of ceded areas altered the reservation status of those ceded lands, not of others.

Petitioners similarly argue that this Court should disregard the other *18* articles of the Act as mere "subsidiary" language (State Resp. 6), even though every statute must be read as a whole and even though this Court carefully considered a number of those articles in its earlier decision in this litigation. This Court's careful attention to other provisions that "contradict[]" and "counsel[] against finding the reservation terminated," *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 350 (1998), would be inexplicable if every provision but the cession provisions were insignificant.

Petitioners' reliance on different agreements concerning different Tribes and different reservations with purportedly "similar" provisions, *see* State Resp. 8-10, likewise fails because the notion "'that similar language in two Treaties involving different parties has precisely the same meaning' is the very assumption that this Court has dismissed as 'a fundamental misunderstanding of basic principles of treaty construction.'" YST Opp. 17-18 (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999)).[2] In particular, the mere fact that *DeCoteau v. District County Court*, 420 U.S. 425 (1975), involved the "cession" of lands and found disestablishment does not compel a finding of disestablishment here, because there are significant differences between this case and *DeCoteau*. *See* YST Opp. 17-19; U.S. Opp. 20-24.

b. For those reasons, the issues here turn on the unique factual record concerning the 1894 Act and its historical context. With respect to the Act, petitioners simply rehash interpretations of Articles V, VIII, and XVII that have already been squarely refuted by this Court, the Eighth Circuit, the district

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[2] For example, there are significant differences between the Yankton act and Nez Perce act, notwithstanding one *amicus*'s strained efforts to deem them "twin[s]." *Cf.* Lewis County *Amicus* Br., No. 10-1059, at 7. The Nez Perce act contains neither of the features that this Court found to contradict disestablishment in *Yankton*: a reservation of agency trust lands and a liquor prohibition that draws a jurisdictional distinction between reservation and ceded land. *See Yankton*, 522 U.S at 350.

court, or all three. Notwithstanding petitioners' continued protestations, *see* State Resp. 8, this Court made clear 13 years ago that Article VIII, concerning the agency trust lands, "counsels against finding the reservation terminated," and that Article XVII, concerning liquor sales, drew a "jurisdictional distinction between reservation and ceded land." *Yankton*, 522 U.S. at 350. Both the Eighth Circuit and the district court further found that Article V, concerning tribal courts and other local institutions, likewise "signals congressional intent consistent with the continuing reservation status of the allotted lands and an intent to preserve tribal self-government." Pet. App. 292; *see also id.* at 239.[3]

In addition to disputing those determinations, petitioners pointedly ignore the context of the negotiations and legislation. That context strongly supports the Tribe by showing that the Commissioners, the Tribe, and Congress focused on the unallotted acres, and had no intent to disturb the remainder of the reservation. YST Cross-Pet. 13-15; YST Opp. 14. Petitioners' sole response is that the Eighth Circuit's acknowledgement that "'the Commission's reports do not describe any

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[3] The State asserts that Article XVII would only have been necessary if the reservation was disestablished because "liquor had been illegal in Indian country since 1832." State Resp. 10. In fact, as the district court found, "Congress outlawed the sale of intoxicating liquor in Indian Country on July 23, 1892" and there was "no indication in the Commissioners' reports that either party was aware of the liquor statute when the Agreement was reached" relatively shortly thereafter Pet. App. 304 (citing 27 Stat. 260).

reservation boundaries'" somehow "undermines the claims of the Tribe." County Resp. 24 (quoting from Pet. App. 236). But the reservation already existed; the absence of any description of reduced or eliminated boundaries only *supports* the conclusion that Congress intended to diminish the existing reservation only to the extent of the ceded lands, and no further. *See* Pet. App. 237. Otherwise, Congress presumably would have explained what further change in boundaries it had in mind.

Apart from disputing this Court's prior reading of the Act and ignoring the compelling historical context, petitioners recycle a number of arguments from their petitions that the Tribe and the United States already addressed at length in their briefs in opposition. For instance, it is not the case that the retention of "tribal land in common" is a prerequisite to reservation status. *See* YST Opp. 19-20; *cf.* State Resp. 11. Nor does the "tribal ownership" in question refer to lands owned by the Tribe itself, as opposed to "lands in which the Indians held some form of property interest" such as "trust lands" and "individual allotments." *Solem v. Bartlett*, 465 U.S. 463, 468 (1984).

It is also unfair to suggest that the post-enactment history reflected a settled understanding of disestablishment. *See* YST Opp. 19; U.S. Opp. 13-14; *cf.* State Resp. 14. Indeed, it was only after the State intervened in the Tribe's modest effort to respond to the imminent construction of an unlined waste site that this litigation transmogrified into an existential challenge to the entire Yankton Sioux Reservation.

4. Lacking a strong merits argument, petitioners make a number of practical assertions that the Tribe already refuted in its brief in opposition. Upholding the Tribe's position would not "radically alter" jurisdictional treatment of non-Indians, as this Court has already imposed strict limits on tribes' authority over non-members. *See* YST Opp. 27-28; *cf.* State Resp. 13. It is especially inaccurate to describe the diminished reservation configuration as "unknown to Indian law," State Resp. 4, when non-contiguous, checkerboarded reservations abound. *See* YST Opp. 30-31. And it is pure speculation to ponder the implications of the decision below on post-1948 fee lands when the court of appeals declined to consider those lands because they were not properly before it. *See* YST Opp. 28-30; *cf.* County Resp. 24-34.

For present purposes, the point is a simple one: none of the fact-bound petitions warrants further review, but if this Court were to grant one or more of the principal petitions, it should also grant the conditional cross-petition so that the Court would not face any procedural obstacles to deciding the case in accordance with its own view of congressional intent.

CONCLUSION

This Court should deny the petitions for a writ of certiorari in Nos. 10-929, 10-931, and 10-932. But if this Court were to grant one or more of those petitions, it should also grant this conditional cross-petition.

Respectfully submitted,

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